

86-640

2

Supreme Court, U.S.  
FILED

OCT 14 1986

JOSEPH F. SPANIOL, JR.  
CLERK

NO. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

---

GENEVA HARRIS, as Personal  
Representative of the Estate  
of Doretha a/k/a Dorothea Rolle,  
Deceased,

Petitioner,

-versus-

THE CITY OF MIAMI,

Respondent.

---

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO THE  
DISTRICT COURT OF APPEAL OF FLORIDA,  
THIRD DISTRICT

City of Miami v. Harris, 490 So.2d 69  
(3d DCA 1985)

---

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18/1/87



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IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1986

MONDAY, JULY 14,  
1986

THE CITY OF MIAMI, \*\*

Appellant, \*\*

vs. \*\* CASE NOS. 84-1679

84-2525

GENEVA HARRIS, as \*\*

85-1352

Personal Representa- \*\*  
tive of the Estate \*\*

of Doretha a/k/a \*\*

Dorothea Rolle, \*\*

Deceased, \*\*

Appellee. \*\*

Upon consideration, the appellee's  
motion for rehearing and/or clarification  
and/or certification is denied. The  
appellant's motions for extension of time  
to respond and to strike are denied as  
moot.

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ATTEST:

LOUIS J. SPALLONE

Clerk District Court of  
Appeal, Third District

By: /s/  
Deputy Clerk

cc: David Lawrence Magidson  
Donald Feldman  
Lucia Allen Dougherty  
Thomas M. Pflaum

/hb



IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

THE CITY OF MIAMI, \*\*

Appellant, \*\*

vs. \*\* CASE NOS. 84-1679

84-2525

GENEVA HARRIS, as \*\*

85-1352

Personal Representa- \*\*  
tive of the Estate \*\*

of Doretha a/k/a \*\*

Dorothea Rolle, \*\*

Deceased, \*\*

Appellee. \*\*

Opinion filed June 3, 1986.

Appeals from the Circuit Court for  
Dade County, Murray Goldman, Judge.

Lucia A. Dougherty, City Attorney,  
and Gisela Cardonne, Deputy City Attorney;  
Simon, Schindler, Hurst & Sandberg and  
Thomas M. Pflaum, for appellant.

Feldman & Levy and Donald Feldman;  
Abramson & Magidson, for appellee.

Before BARKDULL, NESBITT and DANIEL S.  
PEARSON, JJ.





ON SECOND MOTION FOR REHEARING

PEARSON, DANIEL, Judge.

This second opinion on rehearing is in response to the motion of the plaintiffs-appellees. They complain that in the first rehearing (sought by the defendant-City) we changed from affirming to reversing the Section 1983 judgment for the plaintiffs in erroneous reliance on the subsequently decided Daniels v. Williams, 474 U.S. \_\_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), which, they argue, applies to cases involving the liability of individuals only, not to cases, as here, involving the liability of municipalities based on municipal policy. Without now debating the merits of the plaintiffs' argument, we note that in the still more recently decided case of Pembaur v. Cincinnati, \_\_\_\_ U.S. \_\_\_\_,



\_\_\_\_\_, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452, 465 (1986), a plurality of the Court held "that municipal liability under ( 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." There being no such proof adduced by the plaintiffs, the judgment in their favor must be reversed. However, because this failure of proof is attributable to the plaintiffs' having proved only that required by the law at the time of trial, they will have an opportunity to supply the missing proof upon a retrial of the case. With this clarification, we adhere to our opinion on rehearing filed in this cause on April 1, 1986.

THE  
CITY OF  
NEW YORK

IN SENATE  
JANUARY 10, 1900

REPORT OF THE  
COMMISSIONER OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1899

ALBANY: J.B. LIPPINCOTT & CO.,  
PRINTERS, 1899.

THE CITY OF NEW YORK  
LAND OFFICE

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PRINTERS, 1899.

THE CITY OF NEW YORK  
LAND OFFICE

ALBANY: J.B. LIPPINCOTT & CO.,  
PRINTERS, 1899.

THE CITY OF NEW YORK  
LAND OFFICE

IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JANUARY TERM,  
A.D. 1986

WEDNESDAY, APRIL 9,  
1986

THE CITY OF MIAMI, \*\*

Appellant, \*\*

vs. \*\* CASE NOS. 84-1679

84-2525

85-1352

GENEVA HARRIS, as \*\*

Personal Representa- \*\*

tive of the Estate \*\*

of Doretha a/k/a \*\*

Dorothea Rolle, \*\*

Deceased, \*\*

Appellee. \*\*

\*\*

Upon consideration of appellee's motion to vacate order on rehearing, or alternatively, motion to stay issuance of mandate and motion for extension of time to file rehearing motions, it is ordered that the motion to vacate order on rehearing is denied; appellee's motion for



extension of time to file motion for rehearing is granted, and the motion for rehearing shall be filed on or before 15 days from the date hereof.

A True Copy

ATTEST:

/s/  
Clerk District Court of  
Appeal, Third District

cc: Lucia A. Dougherty  
Thomas M. Pflaum  
David L. Magidson  
Donald Feldman

/hb





IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1986

THE CITY OF MIAMI,	**	
Appellant,	**	
vs.	**	CASE NOS. 84-1679
		84-2525
GENEVA HARRIS, as	**	85-1352
Personal Representa-	**	
tive of the Estate	**	
of Doretha a/k/a	**	
Dorothea Rolle,	**	
Deceased,	**	
Appellee.	**	

Opinion filed April 1, 1986.

Appeals from the Circuit Court for  
Dade County, Murray Goldman, Judge.

Lucia A. Dougherty, City Attorney,  
and Gisela Cardonne, Deputy City Attorney;  
Simon, Schindler, Hurst & Sandberg and  
Thomas M. Pflaum, for appellant.

Feldman & Levy and Donald Feldman;  
Abramson & Magidson, for appellee.



Before BARKDULL, NESBITT and DANIEL S. PEARSON, JJ.

ON REHEARING

PEARSON, DANIEL, Judge.

In the month following the release of our opinion in this case and while the appellant's timely-filed motion for rehearing pended, the United States Supreme Court, overruling its prior contrary holding,<sup>1/</sup> decided that mere negligence by a state official can no longer be said to "deprive" an individual of life, liberty or property under the Fourteenth Amendment and thus support a claim for relief under Title 42, United States Code, Section 1983. See Daniels v. Williams, 474 U.S. \_\_\_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Since it is apodictic that where there is a change of law between the trial of a case and the final disposition of the appeal, the

# ARTICLE

BY THE REV. J. H. B. H. H. H.

THE JOURNAL OF THE  
ROYAL ANTHROPOLOGICAL INSTITUTE  
VOLUME 100, PART 1, 1970  
PAGES 1-100  
CONTENTS  
THE JOURNAL OF THE  
ROYAL ANTHROPOLOGICAL INSTITUTE  
VOLUME 100, PART 1, 1970  
PAGES 1-100  
CONTENTS

appellate court must apply the law as it exists at the time of final disposition,<sup>2/</sup> see, e.g., Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Florida East Coast Railway Co. v. Rouse, 194 So.2d 260 (Fla. 1967); Weissman v. State Farm Mutual Automobile Insurance Co., 349 So.2d 749 (Fla. 3d DCA 1977), cert. denied, 359 So.2d 1221 (Fla. 1978), we must now examine the judgment against the City in light of Daniels.

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than



negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient.

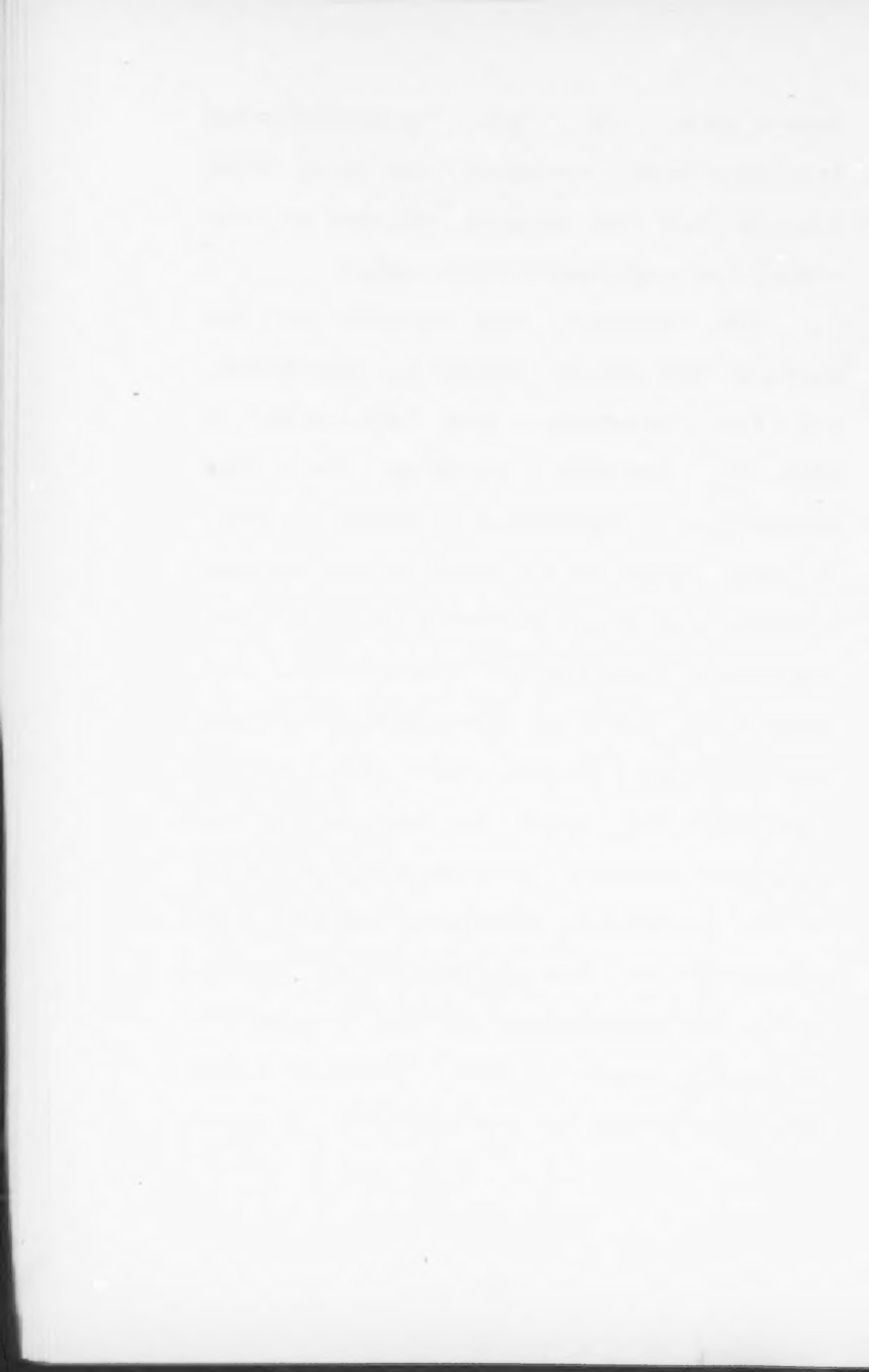
As we noted in our initial opinion, the jury awarded the plaintiffs a total of \$595,000 in damages, but was not asked to and did not allocate the damages to either the common-law negligence or the Section 1983 count of the complaint. So long as the Section 1983 action was affirmable (and until Daniels it was), the fact that the verdict was undifferentiated was of no





consequence to the plaintiffs-the two-issue rule prevented the City from arguing that the verdict related to the common-law negligence count only.

Now, however, the verdict on the Section 1983 action cannot be sustained, and the plaintiffs are left with a \$595,000 judgment relating to the common-law negligence count only. Because, again, as we noted in our initial opinion, see slip opinion p. 3 n. 3, the common-law negligence count will not support an award of attorneys' fees and the monetary limits of the City's liability set forth in the waiver of sovereign immunity statute clearly apply to the common-law negligence count, the elimination of the Section 1983 count, unlike the elimination of the common-law negligence count, will severely and adversely affect the plaintiffs.



We can, of course, affirm the judgment as to liability on the common-law negligence count, and we again do so. However, because the \$595,000 amount clearly is a cumulative amount relating to both causes of action, we must remand for a new trial on damages only on the common-law negligence count.

We must reverse the judgment on the Section 1983 count and the consequent award of attorneys' fees. Consistent with the principle that where there has been a change in the law between trial and appeal which necessitates a reversal, the case should be remanded for a new trial under the new law, we remand for a new trial on both liability and damages on the Section 1983 count. As we noted in Eastern Air Lines, Inc. v. Gellert, 438 So.2d 923, 929 (Fla. 3d DCA 1983), where a party's failure of proof (there the failure to

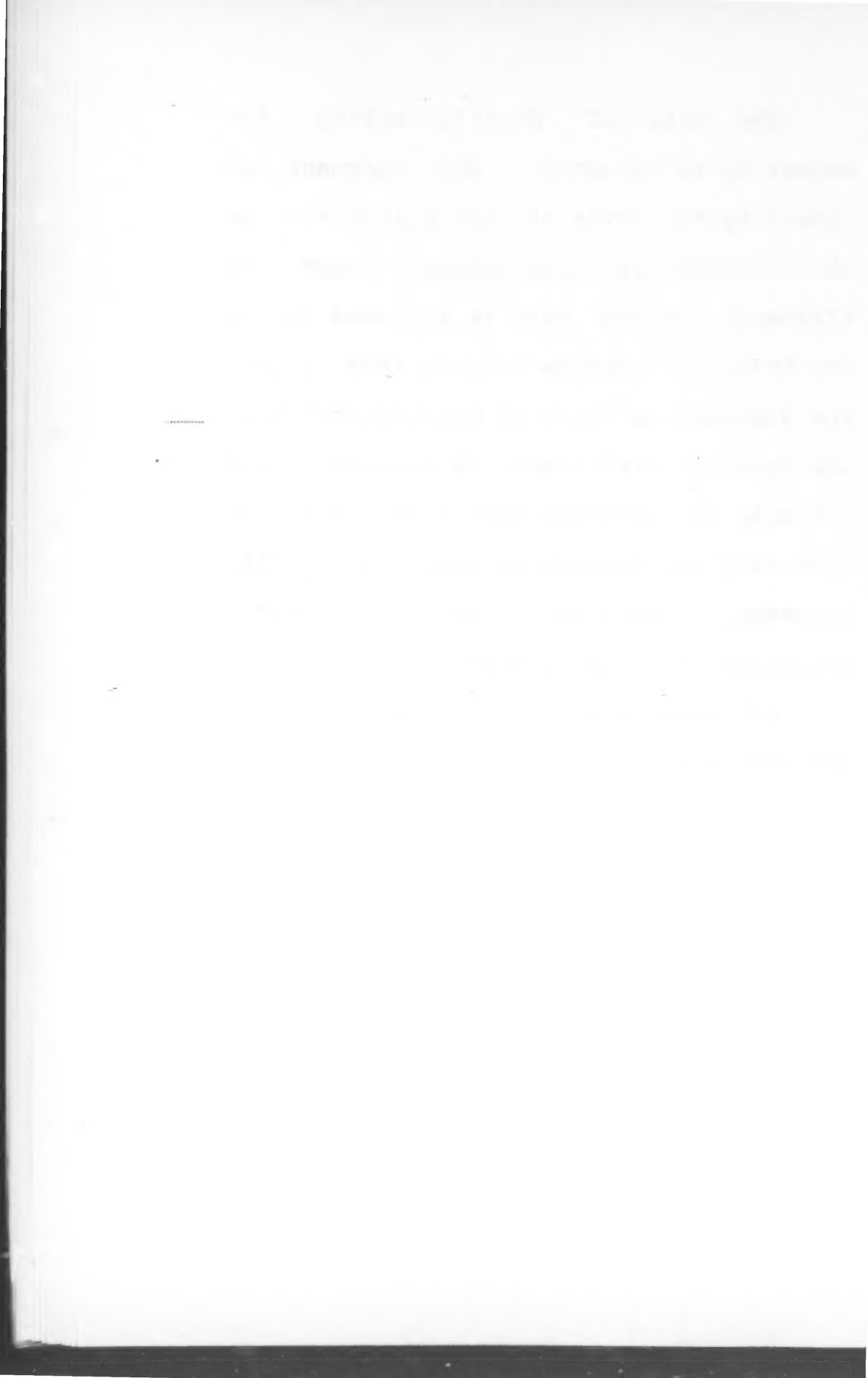


elicit independent proof of the corporation's fault to sustain a punitive damage judgment against the corporation) is attributable to the party proving only that required by the law at the time of trial, the other side will not "receive a windfall merely because the law has changed between trial and appeal," but instead the adversely affected party will have an opportunity to supply the missing proof upon a retrial of the case.<sup>3/</sup> Similarly, the present plaintiffs tried the case, under Parratt, on the premise that a showing of the City's negligence in adopting its policy in regard to police chases was enough to prove a Section 1983 violation. They should be given the opportunity, under Daniels, to prove the "more than negligence" that Daniels requires.<sup>4/</sup>



The City of Miami's motion for rehearing is granted. The judgment of liability in favor of the plaintiffs on the common-law negligence count is affirmed, and the case is remanded for a new trial on damages only on that count. The judgment in favor of the plaintiffs on the Section 1983 count is reversed, and the case is remanded for a new trial on liability and damages on that count. The judgment awarding the plaintiffs attorneys' fees is reversed.

Affirmed in part; reversed in part, and remanded.





## FOOTNOTES

- 1/ See Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).
- 2/ Where the change in law would cause a general upheaval in pending litigation, the rule is otherwise. In the "general upheaval" cases, the new rule of law applies only to (1) cases in which it has been applied, (2) cases where trial has not yet begun, (3) cases on appeal where the applicability of the new rule has been preserved as a question for appellate review, (4) cases in which trial has begun or in which verdict or judgment has been entered but the applicability of the new rule was properly raised during some stage of the litigation, and (5) quite obviously, cases not yet commenced. See Linder v. Combustion Engineering, Inc., 342 So.2d 474 (Fla. 1977) (applying newly adopted doctrine of strict liability); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) (discussing application of new principals of comparative negligence). In our view, the Daniels decision will not cause a general upheaval in litigation.
- 3/ The fact that a party, unlike the plaintiffs here, could have anticipated the coming change in the law does not necessarily prevent the rule from applying. See Weissman v. State Farm Mutual Automobile Insurance Co., 349 So.2d at 750. n. 1.



4/ In Daniels, the plaintiff conceded that the state officer was at most negligent. Accordingly, the Supreme Court, as it expressly noted, did not decide "whether something less than intentional conduct, such as recklessness or 'gross negligence' is enough to trigger the protections of the Due Process Clause." Daniels v. Williams, 474 U.S. at \_\_\_\_\_ n. 3, 106 S.Ct. at 667 n. 3, 88 L.Ed.2d at 670 n. 3. This question likely will have to be answered by the trial court upon retrial of this case.



IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

JULY TERM, 1985

THE CITY OF MIAMI, \*\*

Appellant, \*\*

vs. \*\* CASE NOS. 84-1679

84-2525

85-1352

GENEVA HARRIS, as \*\*

Personal Representa- \*\*

tive of the Estate \*\*

of Doretha a/k/a \*\*

Dorothea Rolle, \*\*

Deceased, \*\*

\*\*

Appellee.

\*\*

Opinion filed December 17, 1985.

Appeals from the Circuit Court for  
Dade County, Murray Goldman, Judge.

Lucia A. Dougherty, City Attorney,  
and Gisela Cardonne, Deputy City Attorney,  
for appellant.

Feldman & Levy and Donald Feldman;  
Abramson & Magidson, for appellee.

Before BARKDULL, NESBITT and DANIEL S.  
PEARSON, JJ.



PEARSON, DANIEL, Judge.

When police officers of the City of Miami, in high-speed pursuit of a vehicle being driven by a suspected burglar down a congested street, rammed the fleeing suspect's car, locked fenders with it, and forced it off the road into a bus bench on which Mrs. Doretha Rolle was sitting, Mrs. Rolle was killed. Geneva Harris, Mrs. Rolle's mother and personal representative, brought an action against the City on behalf of the estate and Mrs. Rolle's three minor children, alleging that the City's police officers were negligent and, in a separate count brought under the authority of Title 42 United States Code, Section 1983, that the City's unreasonable policy in regard to pursuit of law violators deprived Mrs. Rolle of her constitutionally





guaranteed rights.<sup>1/</sup> A jury returned a verdict for the plaintiffs, finding that the negligence of its officers (for which the City was responsible through the doctrine of respondeat superior) and the City's "inadequate policy in regard to police chases" both were the legal causes of Mrs. Rolle's death. The jury awarded the plaintiffs a total of \$595,000 in damages, but was not asked to and did not allocate the damages to one or the other causes of action. The trial court entered judgment on the verdict and, after separate hearing, awarded the plaintiffs' attorneys \$100,000 in fees under the authority of Title 42 United States Code, Section 1988, which, inter alia, authorizes the award of attorneys' fees to parties prevailing under Section 1983.<sup>2/</sup> The City appeals.



We affirm the judgment entered on the jury's verdict. We reverse the judgment for attorneys' fees and remand that issue to the trial court for further proceedings and consideration.

The City contends that (1) the plaintiffs failed to sufficiently prove a custom or policy on the part of the City requisite to a finding of liability under Title 42 United States Code, Section 1983; (2) there was not a sufficient predicate to admit the testimony of the plaintiffs' expert on police procedures; (3) the award of attorneys' fees was improper in that (a) the verdict form does not reflect that the plaintiffs were awarded damages for a violation of Section 1983 rather than common law negligence, and (b) it was not supported by substantial competent evidence; and (4) the trial court incorrectly instructed the jury.<sup>3/</sup> In our



view, only the first three of these contentions merit any discussion.

Both parties agree that essential to recovery in a Section 1983 action against a municipality is a showing that the alleged constitutional deprivation flowed from an official policy or custom of the municipality, and that the policy or custom was "the moving force of the constitutional violation."<sup>4/</sup> Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). A finding of a policy or custom is necessary because it shows that the violation was "neither random nor unauthorized but wholly predictable, authorized and within the power of the [City] to control." Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc). "Proof of a single incident of unconstitutional activity is not



sufficient to impose [municipal] liability,. . .unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy which policy can be attributed to a municipal policymaker." Oklahoma City v. Tuttle, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791, 804 (1985).

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death express rules and regulations that (a) mandated that its police officers, on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk of injury or death for innocent members of the public or the





officer.<sup>5/</sup> The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). There the jury found that the defendant-City was grossly negligent in the training of its officers and that, as a result of this negligence, its officers engaged in a shooting barrage which resulted in the death of an innocent victim. The court wrote that:

"[i]f there is a reckless disregard for human life and safety prevalent among the city's police officers which



threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitutional rights. Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force is satisfied."

767 F.2d at 170.

Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and



safety of innocent persons would meet with the approval, and indeed was required by, the City policymakers. As such, municipal liability under Section 1983 was adequately shown. See also Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985) (where police set up deadman roadblock to stop driver of car who sped up and would not stop for police, and who, though known to have mental problems, did not have outstanding arrest warrants, innocent passenger in chased car injured when car crashed into roadblock had standing to sue municipality based on allegation that the police had a practice of ignoring the Fourth Amendment proscription against unreasonable seizures). Accord Trezevant v. Tampa, 741 F.2d 336 (11th Cir. 1984) (where plaintiff's wrongful incarceration resulted from procedures which failed to



protect constitutional rights, municipal liability is warranted).

The City next argues that the trial court should not have allowed an expert on police procedures called as a witness by the plaintiffs to testify about a safe pursuit policy used by Metropolitan Dade County (a) because the greater size of Dade County's police force (with which the expert was not previously familiar) made its policies not probative of the appropriate City of Miami Policy, and (b) because the expert had not listened to the tape of the chase, had not traveled the route of the chase during the same hours or under the same weather conditions, and had no information as to the condition of the police vehicles or the fleeing suspect's vehicle. The record reflects, however, that the expert testified that the difference in size between the two





police forces would not in any way affect his opinion, and that he read the transcript of the chase and the testimony of the officers involved, and drove the route of the chase. In our view, any difference between the conditions and the expert's lack of detailed knowledge of the vehicles falls far short of establishing that the expert lacked a sufficient basis for his opinion that the duration and speed of the chase at night on well-populated streets was in reckless disregard of the safety of the public. Cf. Husky Industries, Inc. v. Black, 434 So.2d 998, 993 (Fla. 4th DCA 1983); { 90.705(2), Fla.Stat. (1983). The trial court did not abuse its discretion in ruling that the expert's testimony was admissible.

Lastly, we turn to the City's challenge to the attorneys' fee award.



The City contends that the trial court erred by failing to require the jury to apportion the damages found between the negligence and the Section 1983 counts. The City argues that had the jury attributed all of the damages to the common-law negligence count, no attorneys' fee award whatsoever would be permissible. We find, however, that the City failed to preserve this point for appeal when it acquiesced in the verdict form used and failed to request a special verdict form. See Whitman v. Castlewood International Corp., 383 So.2d 618 (Fla. 1980); Abrams v. Paul, 453 So.2d 826 (Fla. 1st DCA 1984). Even as a general verdict must be upheld where there is no error as to at least one of the issues upon which the verdict may have been founded, Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978), so too the attorneys' fees



award here must be upheld where it is impossible to ascertain from the verdict form that the damages were not awarded on the count--Section 1983--that would support an attorneys' fee award. Cf. Barhoush v. Louis, 452 So.2d 1075 (Fla. 4th DCA), pet. for rev. disp., 458 So.2d 271 (Fla. 1984).

Although we have concluded that the verdict as returned will support an attorneys' fees award, we nonetheless must remand the cause for further proceedings respecting the award. Where a trial court awards attorneys' fees to a prevailing party under Section 1988, Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), mandates that the court set forth certain specific findings concerning its fee determination. Because here the trial court did not make these required findings, we must remand the



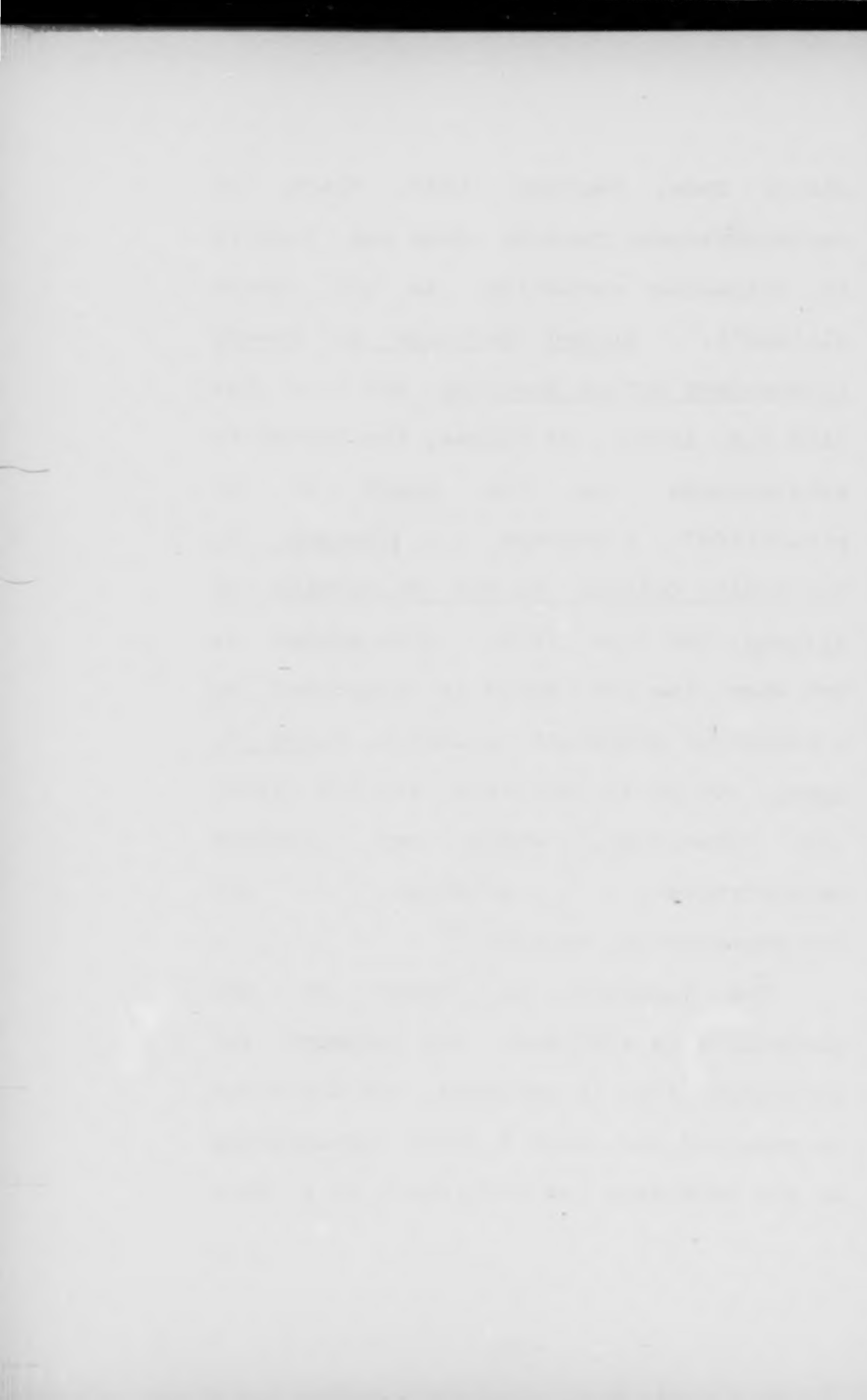
cause for such purpose, and if the trial court deems it necessary, for further proceedings to determine the appropriate fee. We are aware from the record before us that plaintiffs' attorneys did not make contemporaneous records reflecting their labors on the case. Despite the City's urging to the contrary, this omission is not fatal or even necessarily detrimental to their claim. As the Florida Supreme Court stated in Florida Compensation Fund v. Rowe, 472 So.2d 1145, 1150 (Fla. 1985), although "[i]nadequate documentation may result in a reduction in the number of hours claimed. . .," reduction is not required. See Johnson v. University College of the University of Alabama, 706 F.2d 1205, 1207 (11th Cir. 1983), cert. denied, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983) (in proceeding for attorneys' fees under Title 42 United





States Code, Section 1988, "lack of contemporaneous records does not justify an automatic reduction in the hours claimed"). Accord Harkless v. Sweeny Independent School District, 608 F.2d 594 (5th Cir. 1979). Of course, the burden to substantiate the fee award is on plaintiffs' attorneys. Johnson v. University College of the University of Alabama, 706 F.2d 1205. That burden is met when the fee award is supported by substantial competent evidence, Cohen v. Cohen, 400 So.2d 463 (Fla. 4th DCA 1981) (on rehearing), which may include reconstructed, although not contemporaneous, records.<sup>6/</sup>

The judgment in favor of the plaintiffs is affirmed. The judgment for attorneys' fees is reversed, and the cause is remanded for such further proceedings as are necessary and consistent with this



opinion on the issue of attorneys' fees.

Affirmed in part; reversed in part,  
and remanded.

THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

1954-1955

1

## FOOTNOTES

- 1/ State courts have concurrent jurisdiction to entertain causes of action brought under Title 42 United States Code, Section 1983. *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). That section provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

- 2/ Title 42 United States Code, Section 1988, provides in pertinent part:

"In any action or proceeding to enforce a provision of section. . . 1983. . . of this title, . . . the court, in its discretion, may allow the prevailing

## MEMORANDUM

TO : The President, The Board of Directors, and the Executive Committee of the American Red Cross  
FROM : The American Red Cross  
SUBJECT: The American Red Cross  
DATE: 1918

The American Red Cross is a national organization of voluntary workers, organized for the purpose of relieving human suffering. It is a non-profit organization, and its funds are derived from voluntary contributions. The American Red Cross is a member of the International Red Cross and Red Crescent Movement, and it is recognized by the United States Government as the official national Red Cross organization.

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party. . .a reasonable  
attorney's fee as part of  
the costs."

The attorneys' fee provision of Section 1988 applies to actions brought under Section 1983 in state courts. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

- 3/ This court must reach the question of the City's liability under Section 1983 regardless of the resolution of the common law negligence count because (a) attorneys' fees may be awarded under the Section 1983 count but not under the common law negligence count, and (b) the City implicitly concedes that the monetary limits of the City's liability set forth in the waiver of sovereign immunity statute, see { 768.28(5), Fla.Stat. (1983), clearly applicable to the common law negligence count, do not serve to reduce any recovery under the Section 1983 count.
- 4/ To establish individual-as distinguished from municipal--liability under Section 1983, a plaintiff need show only that the defendant (1) acted under color of state law, and (2) deprived the plaintiff of a constitutional right. This lawsuit and appeal do not involve any claim against an individual police officer.
- 5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and





regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 2427, 85 L.Ed.2d 791.

- 6/ The City's reliance on Mercy Hospital v. Johnson, 431 So.2d 687 (Fla. 3d DCA), pet. for rev. denied, 441 So.2d 632 (Fla. 1983), to defeat the attorneys' fee award, is misplaced. In Mercy Hospital, there were no records at all to support the attorneys' claimed hours, and the number of hours claimed was found to be inherently incredible.

REPORT OF THE  
COMMISSIONER OF THE  
LAND OFFICE  
OF THE  
STATE OF  
NEW YORK  
FOR THE  
YEAR  
1881

THE  
LAND OFFICE  
OF THE  
STATE OF  
NEW YORK  
HAS THE  
HONOR  
TO  
ACKNOWLEDGE  
THE  
RECEIPT  
OF  
THE  
AMOUNT  
OF  
THE  
TREASURY  
FOR  
THE  
YEAR  
1881

—

**42 U.S.C. Section 1983. Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. {1979; Pub.L. 96-170, {1, Dec. 29, 1979, 93 Stat. 1284.



## FLORIDA RULES OF APPELLATE PROCEDURE

### Rule 9.030. Jurisdiction of Courts

#### (a) Jurisdiction of Supreme Court

##### (1) Appeal Jurisdiction.

(A) The Supreme Court shall review, by appeal:

(i) final orders of courts imposing sentences of death;1/

(ii) decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.2/

(B) When provided by general law, the Supreme Court shall review:

(i) by appeal final orders entered in proceedings for the validation of bonds or certificates of indebtedness;3/

(ii) action of statewide agencies relating to rates or service of utilities providing electric, gas or telephone service.4/

(2) Discretionary Jurisdiction. The discretionary jurisdiction of the Supreme Court may be sought to review:

(A) decisions of district courts of appeal that:5/

(i) expressly declare valid a state statute;

(ii) expressly construe a provision of the state or federal constitution;

(iii) expressly affect a class of constitutional or state officers;

(iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law;



(v) pass upon a question certified to be of great public importance;

(vi) are certified to be in direct conflict with decisions of other district courts of appeal;

(B) orders and judgments of trial courts certified by the district court of appeal in which the appeal is pending to require immediate resolution by the Supreme Court, and:6/

(i) to be of great public importance, or

(ii) to have a great effect on the proper administration of justice;

(C) questions of law certified by the Supreme Court of the United States or a United States Court of Appeals that are determinative of the cause of action and for which there is no controlling precedent of the Supreme Court of Florida.7/

(3) Original Jurisdiction. The Supreme Court may issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction; and may issue writs of mandamus and quo warranto to state officers and state agencies. The Supreme Court or any justice may issue writs of habeas corpus returnable before the Supreme Court or any justice, a district court of appeal or any judge thereof, or any circuit judge.8/

[Footnotes Omitted]





FLORIDA STATUTES, SECTION 768.28 (1980)

Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusion.

...(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period prior to judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$50,000 or any claim or judgment, or portions thereof, which when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$100,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to \$50,000 or \$100,000, as the case may be, and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions whether or not the state or its agencies or subdivisions possessed sovereign immunity prior to July 1, 1974....

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THE JOURNAL OF THE AMERICAN MATHEMATICAL SOCIETY

VOLUME 14, NUMBER 1, JANUARY 2001  
 ISSN 1079-6762  
 Published by the American Mathematical Society, Providence, Rhode Island

The Journal of the American Mathematical Society is a peer-reviewed journal of research in mathematics. It is published quarterly by the American Mathematical Society. The journal covers a wide range of mathematical topics, including algebra, geometry, analysis, and number theory. It is known for its high standards of quality and its commitment to publishing original research. The journal is a key resource for mathematicians and is widely cited in the field. The American Mathematical Society is a non-profit organization that promotes the development of mathematics and supports the work of mathematicians. It is one of the largest and most influential mathematical organizations in the world. The Journal of the American Mathematical Society is a testament to the Society's commitment to the advancement of mathematics and the dissemination of mathematical knowledge.

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IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

THE CITY OF MIAMI, \*\*

Appellant, \*\*

vs. \*\* CASE NOS. 84-1679

84-2525

GENEVA HARRIS, as \*\*

85-1352

Personal Representa-

tive of the Estate \*\*

of Doretha a/k/a

Dorothea Rolle, \*\*

Deceased, \*\*

Appellee. \*\*

\*\*

APPELLEE'S MOTION TO VACATE ORDER ON  
REHEARING, OR ALTERNATIVELY, MOTION TO  
STAY ISSUANCE OF MANDATE AND FOR EXTENSION  
OF TIME TO FILE REHEARING MOTIONS

---

I. MOTION TO VACATE ORDER ON REHEARING  
FOR WITHDRAWAL OF OPINION AND FOR  
FURTHER BRIEFING AND/OR ORAL  
ARGUMENT.

1. This Motion, asking this  
Honorable Court to vacate its Order filed  
April 1, 1986 and withdraw its Opinion on  
rehearing is premised upon Appellee's firm  
belief that the notions of fundamental

DECLARATION OF THE  
INDEPENDENCE OF THE  
UNITED STATES OF AMERICA  
1776

When in the course of the human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We the subscribers, the Representatives of the United States of America, in Congress assembled, do hereby declare that these United States are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection with Great Britain is and ought to be totally dissolved; and that as the United States have assumed the separate and equal station among the powers of the earth, they have a right to be so treated by all other nations.

In witness whereof, the Representatives of the United States of America, in Congress assembled, have hereunto set their hands and seals, the day and date above written.

Attest:

John Adams

Secretary

IN TESTIMONY WHEREOF, the Representatives of the United States of America, in Congress assembled, have hereunto set their hands and seals, the day and date above written.

Done at the City of New York, the fourth day of July, in the second year of the Independence of the United States of America.

John Adams  
Secretary

John Adams  
Secretary

John Adams  
Secretary

John Adams  
Secretary

John Adams  
Secretary

fairness and equity, whereby Appellee has never been given an opportunity to comment upon or discuss the recent United States Supreme Court decision of Daniels vs. Williams, 474 U.S. \_\_\_\_\_, 106 S.Ct. \_\_\_\_\_, 88 L.Ed.2d 662 (1986), call for and mandate an order granting the relief requested herein, this particularly in light of:

A. Appellant's filing of a motion for rehearing which, as Appellee points out in its Response to Motion for Rehearing, is believed to be improper in that said motion argued with the merits of the Court's order, attacked the Court's order and raised new matters for the first time in the proceedings;

B. Appellant's filing of a Notice of Supplemental Authority on January 29, 1986 which cited, for the first time to four cases decided between





1974 and 1980 which were not discussed in Appellant's brief, nor at oral argument in clear violation of Rule 9.330, Florida Rules of Appellate Procedure;

C. Appellant's unilateral decision to bring unauthorized and ex parte argument before this Honorable Court by filing a four page document on January 29, 1986, entitled "Supplemental Memorandum". Said document refers to the recent Supreme Court decision, Daniels, supra, said to be dispositive of the case at bar;

D. Appellee being placed in the detrimental position of not having an opportunity to comment upon, analyze or discuss Daniels, supra, due to the unavailability of a mechanism under the Florida Rules of Appellate Procedure which would sanction Appellee's initiation of such a discussion.



2. It is respectfully submitted that facially and without any detailed probing or analysis, there are several problems or issues that appear to be generated by the Honorable Court's current opinion. These will be pointed out and then briefly touched upon herein, in the hope this Honorable Court will grant the relief requested and set this matter down for the filing of supplementary briefs and oral argument so that a fully informed decision can be reached on the applicability of the Supreme Court decision to the instant case.

Furthermore, subsequent to its decision in Daniels, supra, the Supreme Court decided Pembaur v. City of Cincinnati, \_\_\_\_ U.S. \_\_\_\_, 54 L.W. 4290 (March 25, 1986), and Appellee respectfully submits that an informed decision in the case at bar necessitates a



Careful review of this most recent Supreme Court decision on municipal liability under Title 42 U.S.C. Section 1983. (Annexed hereto for the convenience of this Honorable Court is a copy of Pembaur v. City of Cincinnati, supra).

3. One of the very real problems generated by this Honorable Court's opinion on rehearing is an ambiguous measuring rod for municipal liability. Is this Honorable Court holding that the state of mind of the policymakers (if so, how many of them) is the test to be applied or is it holding that the standard is the import of the policy itself?

We respectfully submit that this problem is not addressed by this Honorable Court and the language of the opinion itself engenders confusion.



THIS HONORABLE COURT'S OPINION ON  
REHEARING  
April 1, 1986

\* \* \*

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient. (Emphasis supplied) (At pp. 2-3)

Thus, a most difficult problem is facially engendered by this Honorable Court's Opinion on Rehearing as to the

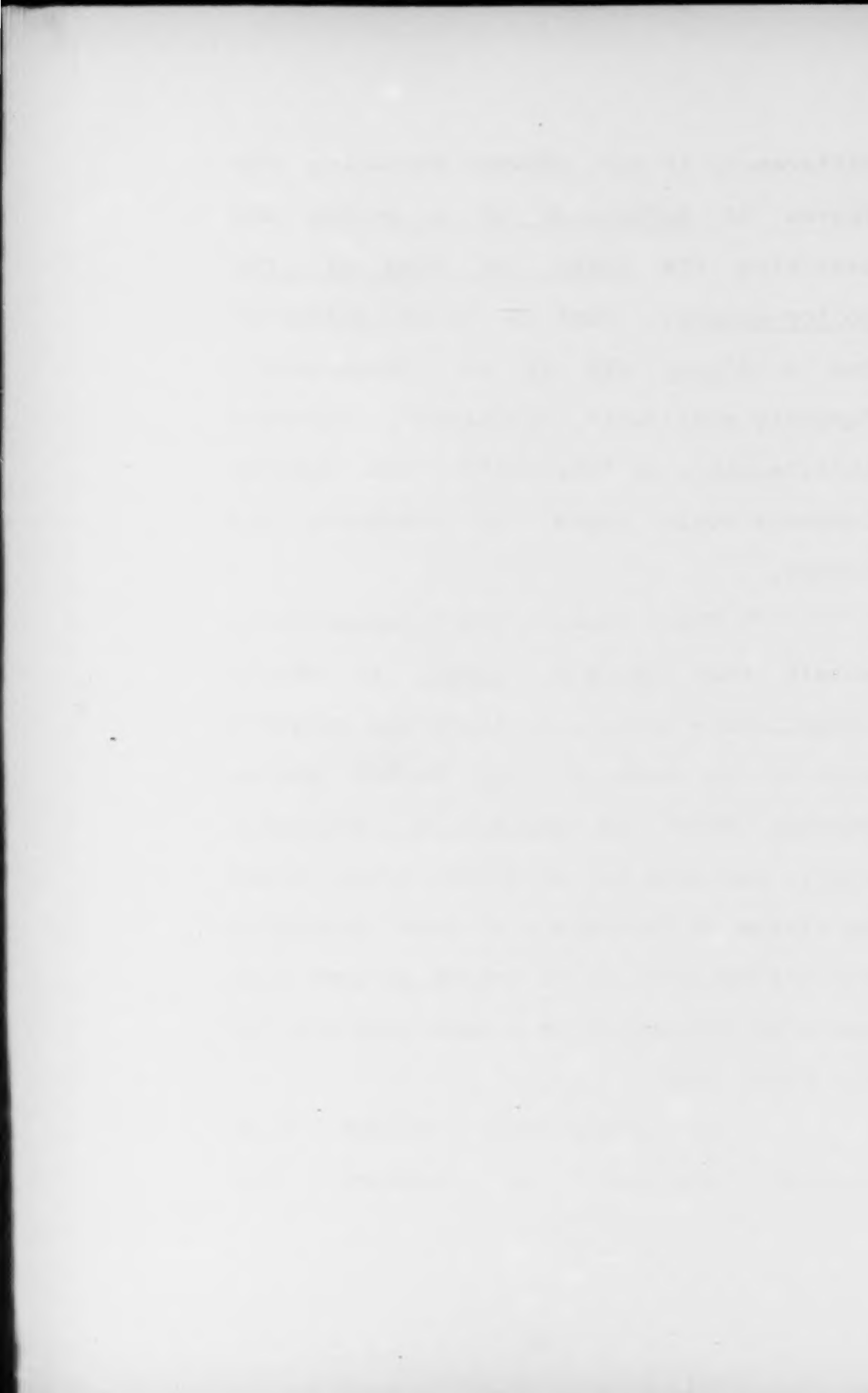




difference, if any, between measuring the degree of deficiency of a policy and measuring the state of mind of the policy-makers. What is to be measured? Can a POLICY PER SE be "negligent", "grossly negligent", "reckless", "grossly indifferent", or "willful"? The English language would appear to pretermitt the latter.

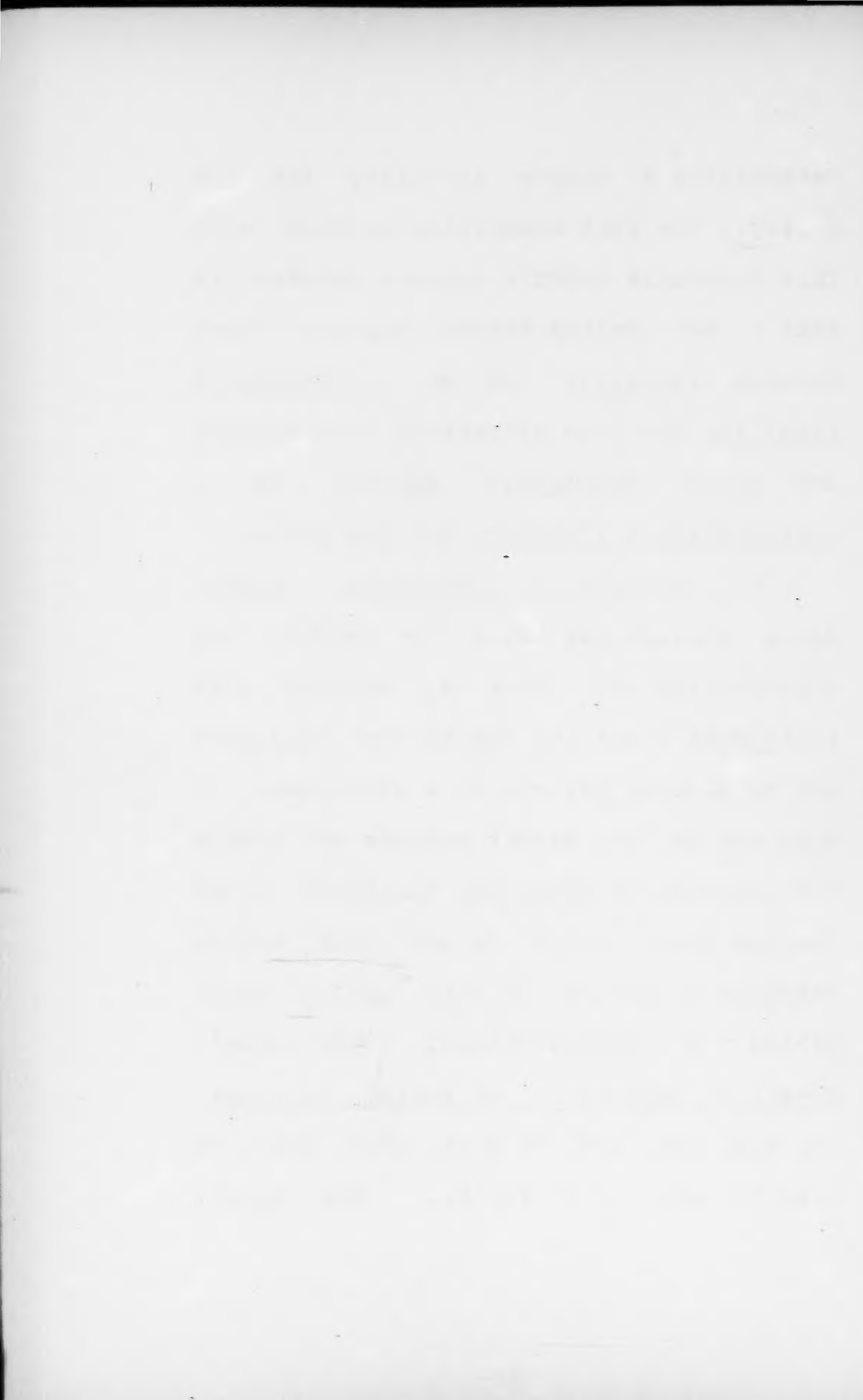
Even though, we respectfully submit that Daniels, supra, is wholly inapplicable herein, to leave the quagmire said to be made by the United States Supreme Court in Daniels v. Williams, supra, and pass it on to the trial court by virtue of Footnote 4 of this Honorable Court's Opinion, is to invite endless more years of litigation in a case long overdue for final rest.

We respectfully submit that neither standard is correct for



determining a city's liability for its policy. The real underlying problem with this Honorable Court's current Opinion is that a new United States Supreme Court Opinion (Daniels) on an individual's liability has been mistakenly (and without any ratio decidendi) applied to a municipality's liability for its policy.

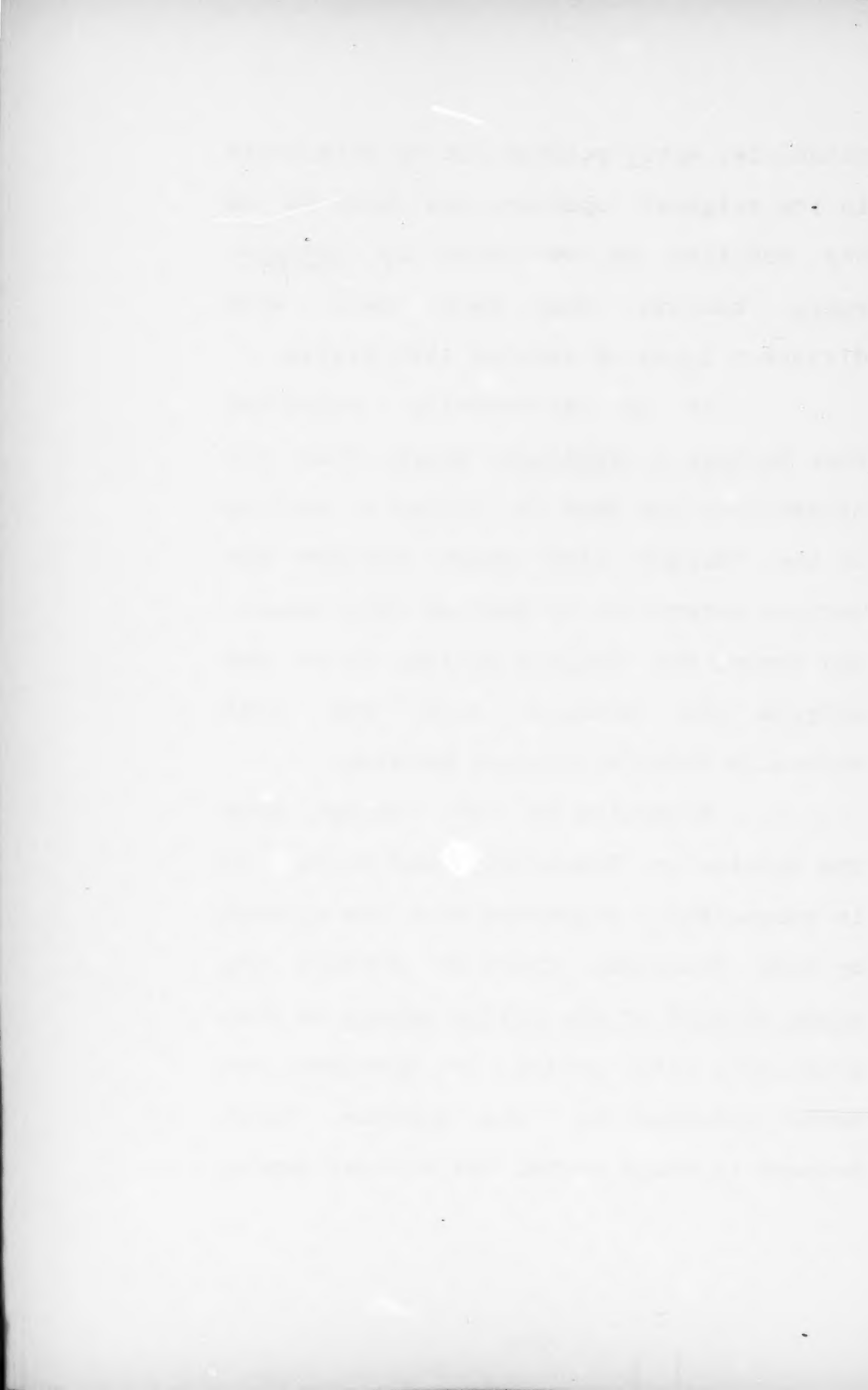
4. Daniels v. Williams, supra, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). The Monell



principle, aptly pointed out by this Court in its original opinion, has been in no way modified or overruled by Daniels, supra, because they each deal with different types of Section 1983 claims.

It is respectfully submitted that Daniels v. Williams, supra, does not necessitate nor does it license a marring of the "Bright Line" which divides the various categories of Section 1983 cases, and hence, the Daniels ruling, in no way affects the present case and this Honorable Court's original holding.

5. Referring to the excerpt from the Opinion on Rehearing cited above, it is respectfully suggested that the attempt by this Honorable Court to measure the state of mind of the policy-makers as they promulgate the policy in question was never intended by the Supreme Court because it would signal the virtual demise



of the Civil Rights Act as such state of mind could hardly ever be the subject of available proof. The fundamental question in a Section 1983 suit grounded on municipal policy, as opposed to one based on a state employee's/individual's actions, is whether or not an authorized policy, when executed, results in an unconstitutional act. See, e.g., Pembaur, supra; Monell, supra. It is this hallmark distinction between individual and municipal liability which lies at the heart of the decision in Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) wherein the Supreme Court would not grant a municipality any type of immunity in a Section 1983 suit even though its individual officials may very well be cloaked with immunity when they act reasonably or in good faith:





Owen v. City of Independence,  
445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d  
673 (1980)

(citing to Syllabus prepared by Reporter  
of Decisions, for ready reference by this  
Honorable Court)

\* \* \*

. . .The District Court, after a  
bench trial, entered judgment  
for respondents. The Court of  
Appeals ultimately affirmed  
holding that although the city  
had violated petitioner's rights  
under the Fourteenth Amendment,  
nevertheless all the  
respondents, including the city,  
were entitled to qualified  
immunity from liability based on  
the good faith of the city  
officials involved.

Held: A municipality has  
no immunity from liability under  
{ 1983 flowing from its  
constitutional violations and  
may not assert the good faith of  
its officers as a defense to  
such liability.

\* \* \*

(d) Rejection of a  
construction of { 1983 that  
would accord municipalities a  
qualified immunity for their  
good-faith constitutional  
violations is compelled both by  
the purpose of { 1983 to provide



protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials--the injustice particularly in the absence of bad faith of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively--are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue.

(Emphasis supplied)

It is thus, crystal clear that the state of mind of the policy-makers is irrelevant in determining municipal liability.

6. It is respectfully submitted that the transmogrification by this Court

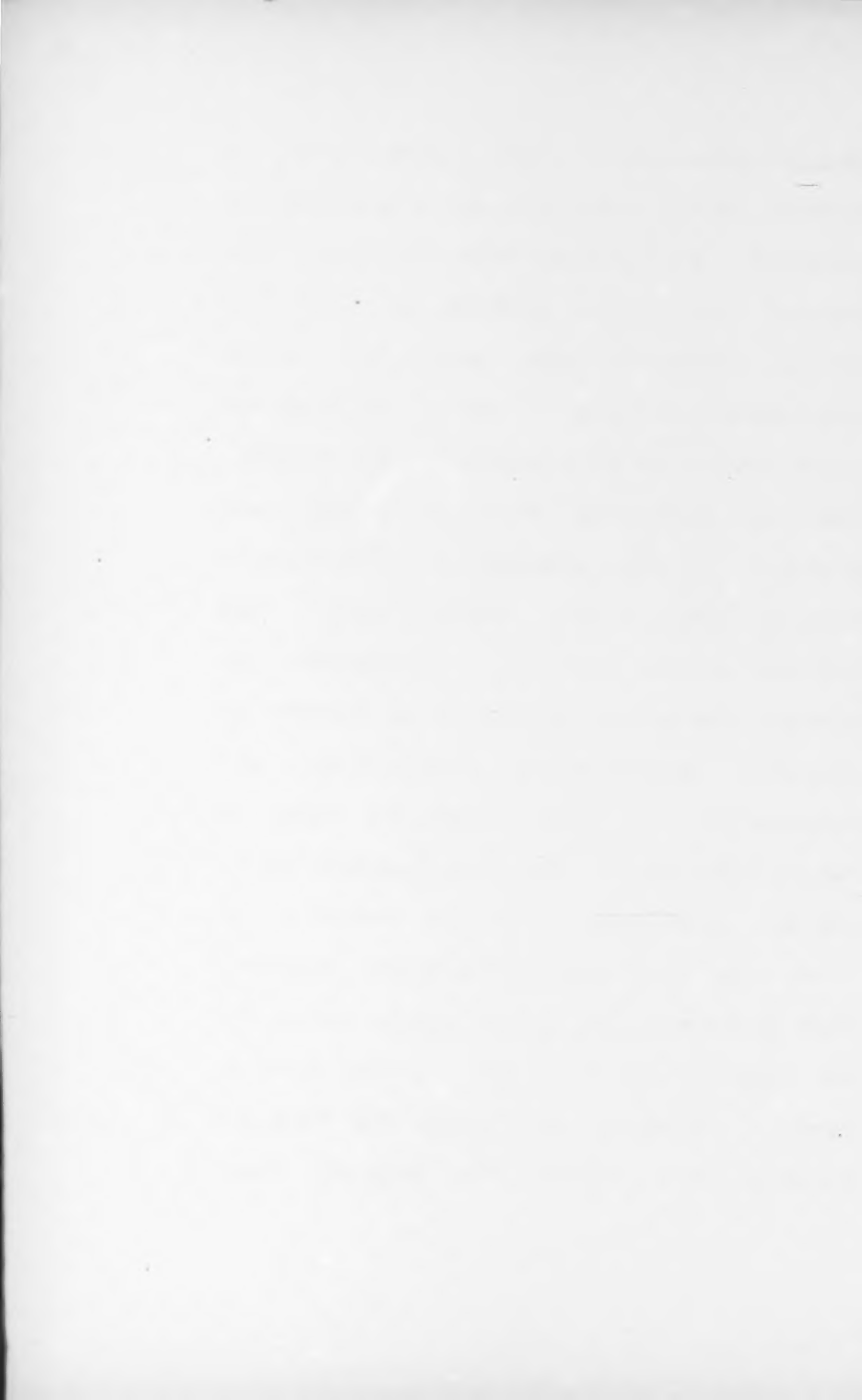


of Section 1983 individual liability principles and nomenclature (negligence, lack of due care, gross negligence, reckless disregard, intent, willfulness, etc.) to a Section 1983 municipal policy/liability setting is at odds, not only with prior Supreme Court decisions left in tact by Daniels v. Williams, supra,<sup>1/</sup> (See e.g., Hudson v. Palmer, 468 U.S. \_\_\_\_\_, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983); Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1981)), but also with last week's decision in Pembaur v. City of Cincinnati, \_\_\_\_\_ U.S. \_\_\_\_\_, 54 L.W. 4290 (March 25, 1986).

In Pembaur v. City of Cincinnati, supra, the Supreme Court found municipal liability to attach to an official county policy which was promulgated by a high County official, a



County prosecutor, who authorized a forcible entry into plaintiff's place of business. At the time that the entry was carried out, this particular type of police conduct was permitted under Constitutional law. Prior to Supreme Court review of this Section 1983 action, the law governing forcible entry was changed. In addressing plaintiff's Section 1983 civil damage suit, the Supreme Court was only interested in whether the policy inflicted an injury or caused a Constitutional deprivation, and because it did, the state of mind or "wrongfulness" of the policy-maker would not be considered. In its decision on rehearing, this Honorable Court suggests that Daniels v. Williams, supra, calls for an examination of the policy-makers' conduct. Clearly, if Daniels was intended to have this effect, the Pembaur Court





would have been obliged to dismiss plaintiff's action because it is clear that the policy-maker, by making policy in accordance with the law of forcible entry as it then existed, did not act negligently, recklessly or willfully.

It is most notable in Pembaur, supra, that there was indeed individual action, but such action, because done by a policy-maker was also considered to be county policy. The standards for governmental liability were applied by the United States Supreme Court, not that of an individual's liability.

7. The use of deadly force herein violates the clear holding of City of Memphis Police Department v. Garner, 471 U.S. \_\_\_\_\_, 105 S.Ct. \_\_\_\_\_, 85 L.Ed.2d (1985) and the Fourth Amendment. (Please see Answer Brief of Appellee pp. 40-45).



This basis of liability has not been addressed by this Honorable Court.

8. A finding by the trier of fact that a policy is either adequate or inadequate is a well-recognized and appropriate device by which to measure policy of governmental bodies (Please see Appellee's Answer Brief pp. 40-45). Moreover, these terms are neutral as to degrees of care and do not connote "negligence", "reasonableness" or any other state of mind or conduct.

9. In any event, with further regard to the alleged erroneous use of the "Adequate/inadequate" nomenclature, there can be no reversible error as the parties agreed to the use of these terms in both the jury instructions and the verdict form (T 835-839; 894).

10. This Honorable Court has stated in its current Opinion that there was no



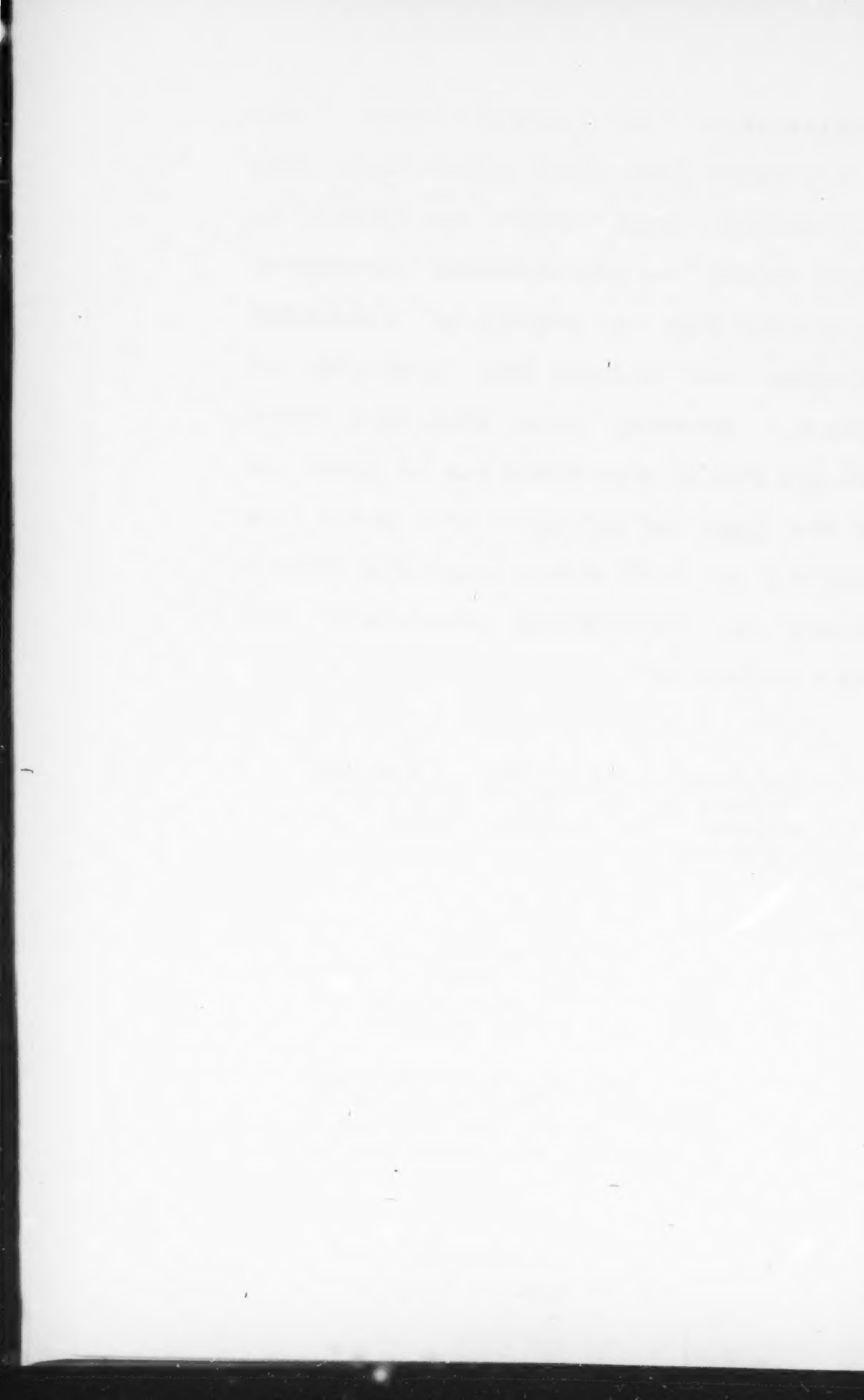
consideration or proof that the policy-maker (the City) acted more than negligently, with either an intent to cause injury, or with reckless disregard. We believe such an inquiry is irrelevant in order for Section 1983 liability to attach. Moreover, this Honorable Court has not stated that there was no proof as to the type of policy. The proof was directly to the effect that the City's policy was "incredibly reckless", and "unconscionable":

Testimony of Dr. Kirkham  
(appearing at pp. A-122-123,  
Appendix to Answer Brief of  
Appellee)

\* \* \*

Q. Could you tell us, if you would, what your professional opinion is of that particular policy?

A. That it is incredibly reckless. That it flies in the face of basic principals regarding police



pursuit. That I, as an expert, have never seen such a policy in this country. That it places the goals of apprehending a suspect over the safety of innocent people, and I think that is unconscionable.  
(Emphasis supplied)

11. This Honorable Court's treatment of the damage question is hard to understand as the parties agreed to use the same measure of damages for both causes of actions and that measure of damages was that of the Florida Standard Jury Instructions for wrongful death. (A-266-271, Appendix to Appellee's Answer Brief). There was no additional element of damage instructed because of the presence of a Section 1983 count. Thus, the jury has already determined the damages under the common law negligence count for wrongful death.

12. It is respectfully submitted that by blending the Supreme Court's clear





lines of demarcation between measuring or scrutinizing municipal policy, as opposed to state employees' individual conduct, this Court is making new and highly destructive inroads into Section 1983. We believe this Court would not want to do so. We do not believe that the Supreme Court ever intended that more be necessary for municipal liability to attach than what was pointed out by this Honorable Court in its original Opinion.

THIS HONORABLE COURT'S ORIGINAL OPINION  
FILED December 17, 1985

\* \* \*

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death, express rules and regulations that (a) mandated that its police officers, on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment of the officer the continuation of the pursuit would involve a significant risk



of injury or death for innocent members of the public or the officer. 5/ The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985).

\* \* \*

Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and safety of innocent persons would meet with the approval of, and indeed was required by, the City policymakers. As such,



municipal liability under  
Section 1983 was adequately  
shown.

(Emphasis supplied)

(At pp. 4-5)

13. Consequently, in light of the particular time frame involved herein where the United States Supreme Court decided two important Section 1983 cases long after plaintiff had its final opportunity to comment upon or discuss these cases, one which is said to be dispositive on Plaintiff's claim itself, it is respectfully requested that this Honorable Court grant Appelle's Motion in the interests of fairness and justice. This matter can then be set down for limited argument and submission of briefs on the narrow issues delineated herein. In this way, both sides would have a full and fair opportunity to participate in having this Court reach a fully informed decision.



II. APPELLEE'S ALTERNATIVE MOTION TO STAY  
ISSUANCE OF MANDATE AND FOR EXTENSION  
OF TIME TO FILE REHEARING MOTIONS.

14. Should this Honorable Court fail to grant the relief requested above (Part I), then Appellee still wishes to protect its rights to file a Motion for a Rehearing pursuant to Rule 9.330 and Rehearing En Banc, pursuant to Rule 9.331 or alternatively, for Certification to the Florida Supreme Court. These motions will require detailed consideration, research and analysis, and counsel for Appellee is scheduled to start a major trial on April 7, 1986 in the 11th Judicial Circuit Court, in and for Dade County, Florida (Green v. Ed Ricke & Sons, Inc., et. al., Case No. 80-8169 (CA-21)).

15. Moreover, unless an extension of time is granted, the initial fifteen (15) day period may expire, or nearly expire





before Part I of this Motion is decided. Hence, Appellee respectfully requests this Honorable Court to stay issuance of the mandate and extend the time for Appellee to file its Motions for Rehearing and Rehearing En Banc and alternatively, For Certification to the Florida Supreme Court until fifteen (15) days from the decision regarding Part I of this Motion.

WHEREFORE, Appellee respectfully requests that this Honorable Court consider Appellee's Motion, and in the interests of justice, grant Part I thereof, and alternatively, grant the relief requested in Part II of this Motion, and grant such other, further and different relief as this Court may deem just and proper.

Dated at Miami, Dade County, Florida,  
this 5th day of April 1986.



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Suite 707 Brickell Centre  
799 Brickell Plaza  
Miami, Florida 33131 and

FELDMAN & LEVY, P.A.  
Attorneys for Appellee  
Suite 1700 Courthouse Tower  
44 West Flagler Street  
Miami, Florida 33130

By: /s/  
Donald Feldman



CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Appellee's Motion to Vacate Order on Rehearing, or Alternatively, Motion to Stay Issuance of Mandate and for Extension of Time to File Rehearing Motions was this 5th day of April 1986, mailed to the following:

Lucia A. Dougherty, City Attorney  
Gisela Cardonne, Asst. City Attorney  
City of Miami Law Department  
169 E. Flagler Street, #1101  
Miami, Florida 33131;

Thomas M. Pflaum, Esq.  
Simon, Schindler, Hurst & Sandberg  
1492 South Miami Avenue  
Miami, Florida 33130; and

Abramson & Magidson, P.A.  
Suite 707 Brickell Centre  
799 Brickell Plaza  
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FELDMAN & LEVY, P.A.  
Attorneys for Appellee  
Suite 1700 Courthouse Tower  
44 West Flagler Street  
Miami, Florida 33130  
Telephone No. (305)374-0007

By: /s/  
Donald Feldman



## FOOTNOTES

- 1/ Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) was solely and exclusively concerned with individual, random, and unauthorized acts of prison officials. The distinction between these types of acts and those acts pursuant to established procedure is clearly drawn and then followed in Hudson v. Palmer, supra and Logan v. Zimmerman Brush Company, supra. The standard for individual, random, and unauthorized acts is said by the Parratt court to be negligence. It is only this aspect of Parratt that has been overruled by Daniels. The other aspects of Parratt are untouched by Daniels. The degree of care for individual, random and unauthorized acts has never been a feature or an issue in the Section 1983 claim herein.





IN THE DISTRICT COURT  
OF APPEAL

THIRD DISTRICT OF  
FLORIDA

CASE NOS. 84-1679  
84-2525  
85-1352

THE CITY OF MIAMI,

Appellant,

vs.

GENEVA HARRIS, as Personal  
Representative of the  
Estate of Doretha a/k/a  
Dorothea Rolle, Deceased,

Appellee.

---

MOTION FOR REHEARING OR FOR REHEARING  
EN BANC, OR ALTERNATIVELY, FOR  
CERTIFICATION TO THE FLORIDA SUPREME COURT

This Court has made a serious error in a significant opinion and so, pursuant to Rules 9.030, 9.330 and 9.331, Fla. R. App. P., the Appellee, GENEVA HARRIS, as Personal Representative of the Estate of Doretha a/k/a Dorothea Rolle, Deceased,



urges this Court to grant a rehearing or rehearing en banc, or alternatively to certify its opinion to the Florida Supreme Court. It is respectfully submitted that this Honorable Court has failed to consider and take into account that which follows.

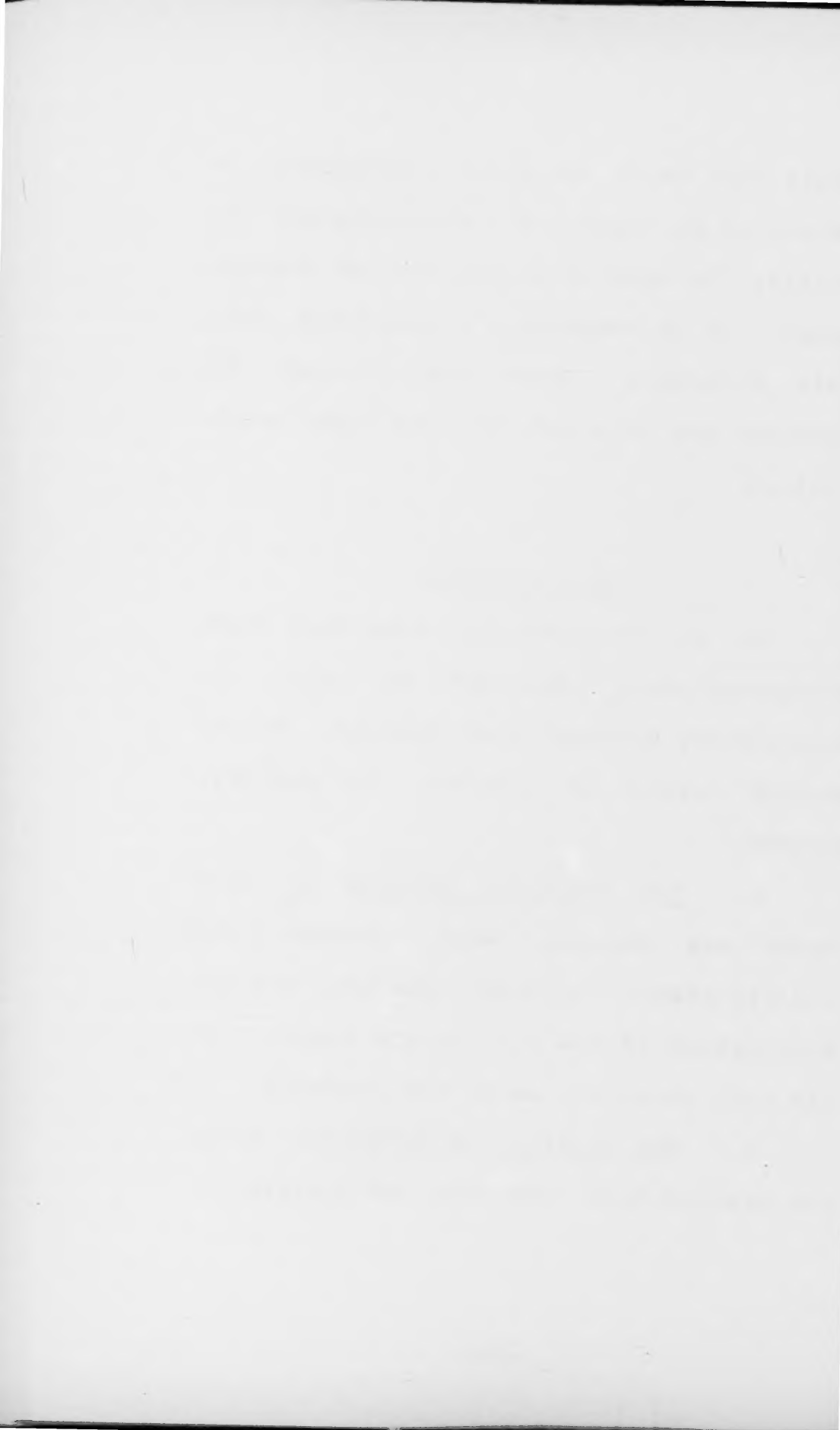
I

IN A NUTSHELL

It is respectfully submitted that stripping this document of all the explanatory material that follows, relief should herein be granted, in summary, because:

1. THE ORIGINAL OPINION in this cause was concise, well reasoned and clearly stated the facts, the law, and the application of the one to the other. It was well received, as it was correct;

2. THE OPINION ON REHEARING takes for granted that the case of Daniels v.



Williams, 474 U.S.\_\_\_\_, 106 S.Ct.\_\_\_\_, 88 L.Ed.2d 662 (1986) applies herein. This Court's opinion lacks any ratio decidendi. Although Daniels was decided after oral argument herein and after the original opinion of this Honorable Court, this Honorable Court, without giving your Appellee, GENEVA HARRIS, etc., any opportunity to comment on Daniels, has adopted same as controlling herein. We respectfully submit that this Honorable Court is in error for so doing because:

A. Daniels is clearly inapposite as it deals solely with individual liability and not governmental liability for its policy;

B. As adopted herein, Daniels would conflict with and would be clearly contrary to the teachings of Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); Monell v.



Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); Hudson v. Palmer, 468 U.S. \_\_\_, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983); and Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

The Supreme Court never intended the application of Daniels herein. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) was solely and exclusively concerned with individual, random, and unauthorized acts of prison officials. The distinction between these types of acts and those acts pursuant to established procedure is clearly drawn and then followed in Hudson v. Palmer, supra, and Logan v. Zimmerman Brush Company, supra. The standard for individual, random, and unauthorized acts is said by the Parratt court to be negligence. It is only this aspect of Parratt that has been





overruled by Daniels. The other aspects of Parratt are untouched by Daniels. The degree of care for individual, random and unauthorized acts has never been a feature or an issue in the Section 1983 claim herein;

C. The most recent United States Supreme Court decision, Pembaur v. City of Cincinnati, \_\_\_\_ U.S. \_\_\_\_, 54 L.W. 4290 (March 25, 1986) illustrates the error of this Honorable Court's approach herein;

D. This Honorable Court's most recent decision, Mazzilli v. Story, 11 F.L.W. 732 (April 4, 1986) is probably not in harmony with the Court's analysis in the opinion herein.

3. If the jury was charged wrongly, and if the verdict form was improper, there can be no reversible error as they



were both mutually agreed upon and/or unobjected to; and

4. There is no need for a new trial on damages in the State Wrongful Death Action as the jury was asked to determine the total amount of damages suffered as a result of the death of Doretha Rolle. The instructions were the Florida Standard Jury Instructions for Wrongful Death. There was no added element of damage, although there should have been, because of the Section 1983 cause of action. Therefore, the jury has already determined the damages under the Florida Cause of Action for Wrongful Death; there was not any duplication of damages.

## II

### THE BASIC FACTS

1. Doretha Rolle was seated on a bus bench in Liberty City on Northwest 17th Avenue and Northwest 58th Street. It



was Sunday evening, April 27, 1980. Approximately twenty to twenty-five minutes before, one Tyrone Grant Rolle, of no relation to Doretha, had just committed a burglary of some shirts and cigarettes at a J.C. Penny Store at Northeast 79th Street and Biscayne Boulevard (T 149).

A high speed police chase involving every police vehicle in the Northern sector of the City ensued with gun shots being fired at the pursuee (T 224). Lastly, the police rammed the robber's vehicle, locked fenders, and forced him off the road into and over Doretha Rolle (A 227-229). Mrs. Rolle sustained fatal injuries.

Doretha Rolle lived in the Ghetto with her three children. She was 32 years of age and worked as a cook at the Dorsey Skills Center in order to support her three children. Glendora was



17, Aaron 12 and Derrick 13 years of age at the time of her accident (T 523 and T 524). Mrs. Geneva Harris, 50 years old, Doretha's mother, was dependent in part upon her for support because of an inability to engage in full time employment due to physical infirmities. Rolle was dragged underneath the offender's vehicle for approximately a block and during such time, she suffered severe painful, and eventually death producing burns.

Before she died, however, Doretha Rolle was hospitalized at the University of Miami Burn Center, Jackson Memorial Hospital, and she lingered through nineteen horrendous days before she expired (T 469). During that course of time, she had to undergo a partial mastectomy and a complete mastectomy. "Her breasts were burned so badly that we



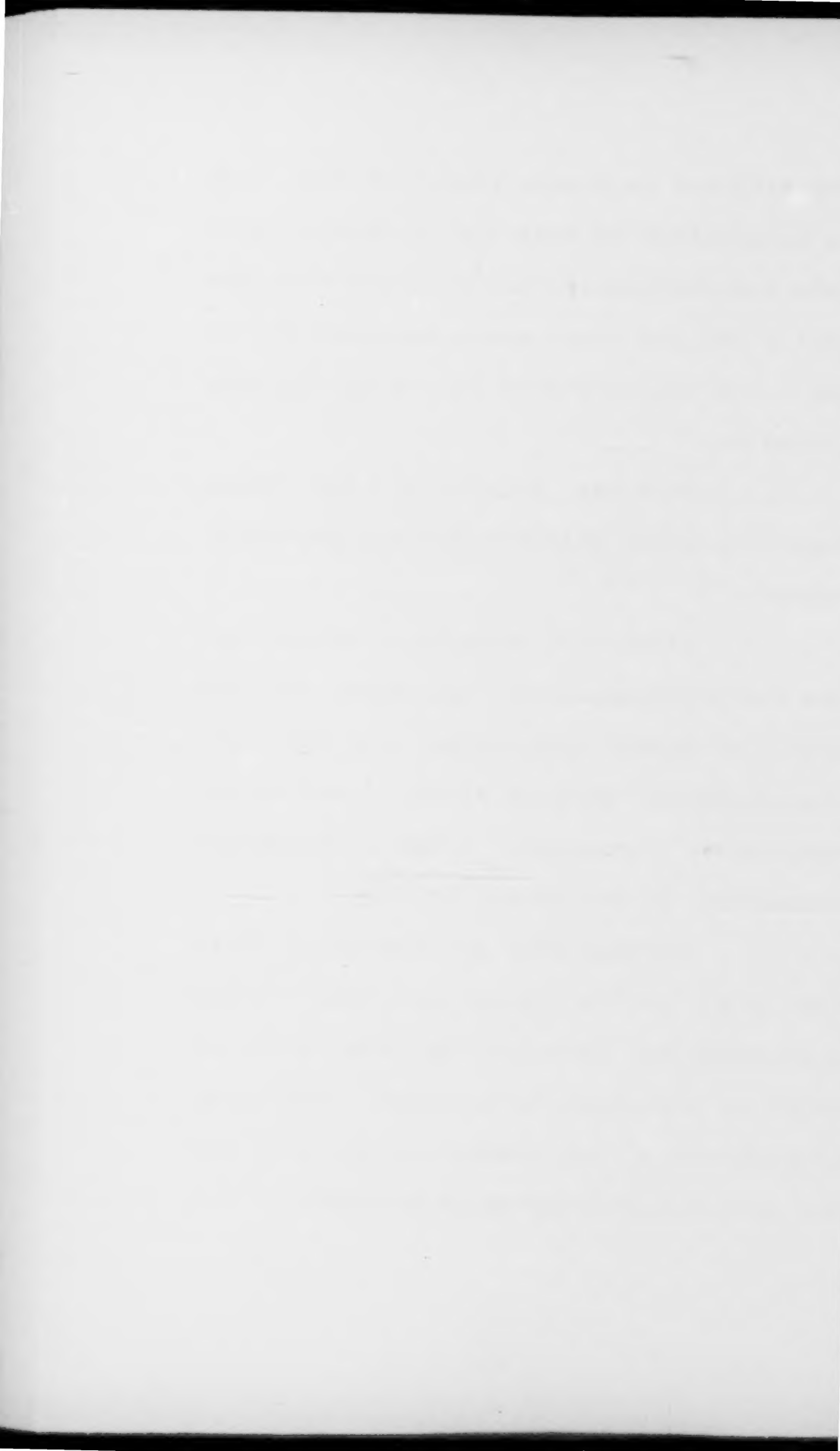


actually had to remove them." (T 473). It is unnecessary to describe in detail what this hospitalization was like and what the family saw and what their reaction to it was. It was anything but a de minimis situation.

2. Suit was brought by her three dependent minor children and her dependent mother.

After jury selection, which had the Plaintiff/Appellee objecting to the CITY OF MIAMI exercising all of its challenges to exclude Blacks, and after opening statements, the testimony commenced. (T 59, 80-86, 527-530).

Officer Crowley testified with the aid of a tape of the radio transmissions recorded by the CITY OF MIAMI on the night in question. The tape, significantly, had breaks in it, and ran for only twelve minutes (T 228-230). The



chase actually encompassed twenty-one minutes (T 200).

An alleged incident of the felon being surrounded at Northwest 17th Avenue and 75th Street was not on the tape, nor was there any indication of police gun fire on the tape (T 236). It is undisputed that the police fired shots at the fleeing car (T 224) (A-5).

It was the CITY OF MIAMI's trial strategy, however, not to question any of its witnesses about the discharge of firearms.

3. The undisputed facts of the chase are that it was high speed (up to 70 m.p.h.) (T 155). The felon's vehicle did not have its lights on (T 150), went through red lights and stop signs, and just missed hitting vehicles (T 155). An attempt was made to block the road with a police vehicle which only caused



accelerated speed and driving on the sidewalk (T 664-666).

The vehicle ran through the front yard of a house, and ran into a police vehicle or it was thought he was going to ram somebody (T 173). There was no supervision of the chase and supervision would have helped (T 177, 199, 200, and 219). Coordination was virtually nonexistent (T 174), even though every unit of the Northern half of the City of Miami Police Department was involved in the chase (T 554).

The police cars were playing "DODGEM".

Officer Crowley testified that the area toward the end of the chase was congested with police and other vehicles (T 168).

Colonel Witt testified that the area was congested with people.



Testimony of Colonel Witt (City  
of Miami Trial Representative)

\* \* \*

Q. Okay.

You recall the portion of the tape where there is a dispatch from Officer Crowley?

Excuse me. There is a communication from Officer Crowley where he says, look out. It is getting congested, and then the dispatcher relays back, again, all units, look out.

\* \* \*

Q. What was the first vision that came into your mind?

A. There is--especially at that time, I think--subsequently, in fact, I know it has subsequently closed, just east of that intersection, there is a Dairy Queen ice cream store that was very, very popular on a warm spring evening.

This was a (sic) 8:30 at night or so on a Sunday. We undoubtedly have \* people there. Just south of 71st Street, there is an--it is again no longer there--there was a very popular night spot.

My experience in nine years in that neighborhood is that that tended to create a good bit of





congestion at that intersection,  
particularly on a Sunday evening.

Q. Thank you very much,  
Colonel.

Just one moment. I'm sorry.

MR. FELDMAN: We have no  
further questions.

Thank you.  
(A-96 and A-97) (Emphasis  
supplied)

4. The pursuee was of the firm  
conviction that he was deliberately hit,  
forced off the road, and knocked into the  
bus bench. This testimony was not  
referred to in Appellant's Initial Brief.

Testimony of Tyronne Grant Rolle

\* \* \*

Q You're moving your hand.

How did the police car hit  
you? Did he turn into you? Did  
you turn into him? Just what  
happened?

A He ran into me. I had  
plenty of chances to run into  
them, if I wanted to run into  
them.



Q So, the police officer ran into you and what happened at that point?

A He knocked me up on the sidewalk.

Q What happened then?

A I hit a bus bench.

Q Is that the bus bench we are talking about?

A Right.

Q What happened after you hit the bus bench?

A I lost control of the car.  
(A 228-229) (Emphasis supplied)

Plaintiff's trial counsel

characterized the event thusly:

Plaintiff's Closing Argument

\* \* \*

It is an insult to everybody's intelligence. There is a direct, direct relationship. There is a police car directly on this particular vehicle. There is a police car which collided with this vehicle.



Why did he leave the road right there. He bumped him once. Then they lock and come together. They separate and he hits the bus bench.

Nonsense. This man was an incredibly good driver. Incredibly good, if you believe that there was a rear tire out, that he was riding along and sparks were flying all over the place.

That they lost him with all these sparks at night. They didn't know where he was. This man was great as a driver. The most incredibly great driver.

He wasn't just leaving the roadway because he decided he wanted to go through bus benches and lights. No. He went there because he was put there.

(T 935-936) (Emphasis supplied)

5. The offender made it crystal clear that he was not anxious to have continued in the chase, but did so solely because of his fear of police reprisal (A 221-222).

It is undisputed that Rolle was unarmed, feared for his life at the hands



of the police and would have liked only the opportunity, to terminate the chase and run on foot if allowed (A 254-255).

His fears were not misplaced.

### Trial Proceedings

\* \* \*

MR. FELDMAN: We have a very sensitive issue as far as I am concerned. Your Honor will note that counsel for the City of Miami at the deposition of Tyronne Rolle in support of her issue of all of his past convictions, arrests, his total conduct, as justification for using that, she wanted to show that he never complained about things in the past. That he claimed force was used upon him, but he never filed any complaints that went to that, and also, that he was not really in fear for his life from the police, their actions, et cetera.

At the conclusion of this incident, the gentleman who was sitting on the bus bench with Mrs. Rolle, who was thrown up by the police car, and never brought a claim for anything, did, however, file a claim with the

THE FIRST PART OF THE HISTORY OF THE  
REIGN OF HENRY THE SECOND  
BY JOHN GILBERT FRODO BAGGINS  
OF THE ORDER OF THE HOLY GRAIL

### THE HISTORY OF THE REIGN OF HENRY THE SECOND

BY JOHN GILBERT FRODO BAGGINS

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THE SECOND PART OF THE HISTORY OF THE  
REIGN OF HENRY THE SECOND  
BY JOHN GILBERT FRODO BAGGINS  
OF THE ORDER OF THE HOLY GRAIL



City of Miami for police brutality and police misconduct.

THE COURT: As to him?

MR. FELDMAN: As to him personally. They thought he was this gentleman here, who said he was in fear for his life. That complaint was that he was put onto the ground, and a gun put to his head and a knee put in his neck, and told, not to run, nigger. Don't you get away, nigger. They abused him on the ground.

The City of Miami based upon the officer saying that that didn't happen, and his willingness to take a polygraph, and the officers not--you know, they dismissed the complaint and they found it was without any basis, and I think that that goes to the issue as to what happens when you file complaints, whether or not he had a justifiable fear at the time for his life.

(T 458-459)

6. The City of Miami had a policy with regard to police chases. There were definitive rules and regulations. In sum, these rules and regulations dictated and mandated that the chase continue even if it took ten days.

City of Dallas, Texas  
February 10, 1911

The Hon. J. C. Little

My dear Sir:  
I have the honor to acknowledge the receipt of your letter of the 7th inst. in relation to the matter of the proposed amendment to the charter of the City of Dallas, Texas, and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,  
Yours very truly,  
J. C. Little

Very truly,  
J. C. Little

City of Dallas, Texas

Very truly,  
J. C. Little

City of Dallas, Texas

Very truly,  
J. C. Little

City of Dallas, Texas

Deposition of Party Defendant, CITY OF

MIAMI

\* \* \*

A. Okay. Pertaining to Item F of the interrogatories, my response being S.O.P. 3.57.3 was quoted here, and I am quoting and referring to 3.57.3 of the rules and regulations manual which I have read before and read as follows.

'Force. The failure on the part of any member to take action with respect to violation of such statutes, laws, ordinances and regulations coming to their attention or about which they have knowledge shall be made the subject of disciplinary action against such member.'

I personally know that is one item that would cause and bind a police officer to pursue a vehicle, a fleeing felon, and that would be an adequate response to item F.

Q. Sir, let me ask you this, if I can. Does this particular 3.57.3--is that meant as your interpretation of it, that it requires that a police officer or police officers should pursue a fleeing felon until forever, or is there some point where they



can stop or do they have to go on forever, if that is necessary?

A. At the time that this incident took place, that this manual was in effect, there was no provision for a police officer to discontinue pursuit of a fleeing felon and cut off. The only criteria that I personally remember from experience in having read these manuals, is that you do so in a safe manner without ever putting yourself in a position of not having control of your vehicle, that you do not exceed, as we read out the general orders over 20 miles an hour over the speed limit. Other than that, yes, sir.

The answer to your question is, you pursue for ten days. As long as it is hot pursuit, and you don't lose sight of the vehicle, and you are in constant contact with the person that you are trying to apprehend.

(A 170-172) (Emphasis supplied)

If a police officer did not continue to chase a fleeing felon, he would be subject to charges of cowardice, neglect of duty, and negligence.

can be used in many ways to the  
benefit of the community.

It is the duty of every citizen  
to contribute to the welfare of the  
community. This can be done in many  
ways. One way is to volunteer  
time and effort to help those in  
need. Another way is to donate  
money or goods to charitable  
organizations. A third way is to  
participate in community projects  
and programs. All of these actions  
can help to make the community a  
better place to live. It is the  
responsibility of every citizen to  
do their part to make the community  
a better place for everyone.

The community is the foundation  
of our society. It is the place  
where we live, work, and play. It  
is the place where we share our  
values and beliefs. It is the place  
where we build our future. The  
community is the heart of our  
society. It is the place where we  
find our identity and purpose.

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90

Deposition of Party Defendant, CITY

OF MIAMI

\* \* \*

A. All right. Now, in looking at the rules and regulations manual, I found other things that as a police officer guided me. They had to do with things that are expected of a police officer. There are different areas in that particular rules and regulations manual and I have them here, and you can read them, that deal with or have to do with the responsibility of members, and other areas. Negligence. Inattention to duty. Other things that would cause a police officer to be held accountable for not pursuing a felon, that could very easily be conceived to be neglect of duty, cowardice, and other things that I believe bind a police officer to pursue a felon.

(A 167) (Emphasis supplied)

7. Dr. Paul Kirkham testified as an expert witness for the Plaintiff/Appellee. He had also been contacted by the City of Miami to testify on its behalf (A 114). He is extremely well credentialed as a criminologist, (A 111-114) and his area of





specialty is police standards and procedures in the United States (A 110).

Dr. Kirkham testified that there are national standards for discontinuing police pursuit that are published by the International Chiefs of Police (A 119-120).

The witness clearly compared acceptable standard police policy to that articulated by the City of Miami and found the latter's policy to be "incredibly reckless", and "unconscionable".

Testimony of Dr. Kirkham

\* \* \*

Q. All right. Going to the City of Miami policy with regard to discontinuing a pursuit, when there is danger, we have heard testimony in this courtroom, and I believe that you have seen it, regarding the actual policy of the City of Miami, to-wit, that the officer has an obligation to continue his pursuit unless, what, he loses sight of the fleeing vehicle, or, two, that the officer's vehicle becomes



disabled. Are you aware of that policy?

A. I am.

Q. Could you tell us, if you would, what your professional opinion is of that particular policy?

A. That it is incredibly reckless. That it flies in the face of basic principals regarding police pursuit. That I, as an expert, have never seen such a policy in this country. That it places the goals of apprehending a suspect over the safety of innocent people, and I think that is unconscionable.

(A 122-123) (Emphasis supplied)

The key difference "simply stated" between the City of Miami's policy and an adequate policy was that the latter policy would provide specifically for discontinuance of the chase when significant risk to innocent persons became evident.

The policy, advocated by Dr. Paul Kirkham, from the International Chiefs of Police reads as follows:

Classified and Controlled Document  
Page 1

1. The first part of the document  
describes the general situation  
of the country at the time of the  
revolution.

2. The second part of the document  
describes the political situation  
of the country at the time of the  
revolution. It is a very important  
part of the document and it is  
very interesting to read. It is  
a very good example of the  
political situation of the country  
at the time of the revolution.

3. The third part of the document  
describes the economic situation  
of the country at the time of the  
revolution. It is a very important  
part of the document and it is  
very interesting to read. It is  
a very good example of the  
economic situation of the country  
at the time of the revolution.

4. The fourth part of the document  
describes the social situation  
of the country at the time of the  
revolution. It is a very important  
part of the document and it is  
very interesting to read. It is  
a very good example of the  
social situation of the country  
at the time of the revolution.

## International Chiefs of Police

Responsibility for the decision to employ emergency vehicle operations in a "fresh pursuit" rests with each officer. In arriving at his decision, the officer must carefully consider all factors involved, including the seriousness of the offense and the possible consequences of his actions. Most importantly, the safety of citizens is the officer's paramount consideration.  
(A 295) (Emphasis supplied)

\* \* \*

ABANDONING PURSUIT: The pursuing officer must at all times use his best judgment in evaluating and reevaluating the chase and make a continuous appraisal of it in deciding whether he should continue the pursuit. The element of personal challenge should never enter into the officer's decision. The decision to abandon pursuit is, under certain circumstances, the most proper course of action. Officers should discontinue any chase when: The hazards of exposing the officer and the public to unnecessary dangers are high.

(A 297) (Emphasis supplied)

The City of Miami's policy not only did not comport with that policy, but it was in direct contravention and contradiction thereof (A 194).



The City of Miami's policy was also in contravention of the then existing policy of Metropolitan Dade County. That policy was allowed in evidence over objection because although the exact numbers of police officers might be different, the fact that they are police departments in major Metropolitan areas is more determinative (A 133-134).

The relevant policy of Metropolitan Dade County was almost a carbon copy of that articulated by the International Chiefs of Police (A 303).

The jury, pursuant to agreed instructions and an agreed form of verdict, found that the CITY was negligent by and through its officers in the Florida Wrongful Death Action. It further found that the CITY had an inadequate policy that was the legal cause of the death of Doretha Rolle on the Section 1983 Count.





## II

### A BIT OF CANDOR

### OR

### WHY BOTHER

#### A. AFTER THIS HONORABLE COURT'S OPINION OF DECEMBER 17, 1985.

1. December 31, 1985 (Amended January 7, 1986): THE CITY OF MIAMI filed a Motion for Rehearing or for Rehearing En Banc, or Alternatively, for Certification to the Florida Supreme Court.

This document was filed by totally new counsel and it was as if the entire appellate procedure was first beginning (or being rewritten).

It was thought that this document was abusive, irreverent, and fallacious, at least in patent disregard of the Florida Appellate Rules;



2. January 7, 1986: GENEVA HARRIS filed her "Response to and Motion to Strike, etc."

To the best of our knowledge, this Honorable Court has not addressed this document;

3. January 13, 1986: CITY OF MIAMI filed its Reply to Appellee's Motion to Strike.

This document just reenforced the prior infirmities of the Motion for Rehearing, etc. and was even more blatantly in violation of the Florida Appellate Rules:

4. January 29, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority which listed cases, the latest of which was decided at least five (5) years prior to oral argument of this cause;



5. February 3, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority (Daniels v. Williams and Davidson v. Cannon).

As the cases were decided January 26, 1986, it could not be argued that this was improper;

6. February 27, 1986: The CITY OF MIAMI filed its Supplemental Memorandum giving its formal "PRESUMPTUOUS" opinions on Daniels and Davidson. This, once again, in clear violation of the Florida Appellate Rules; and

7. April 1, 1986: This Honorable Court entered its Order on Rehearing.

B. AT PRESENT:

1. GENEVA HARRIS is now in the position of having, not to help direct an opinion (which is her right) but of trying to undo what has already been written for all to see. To convince this Court that



which has now been twice done is wrong, rather than to argue what is once done is right, is an unfair, but a present burden, which we most strongly object to.

2. Frankly, there is a very strong temptation to just let be, what is. But, the consequences of leaving this opinion as it is, are perceived to be so great - a very real and unwarranted death in this District and for these Plaintiffs of Section 1983 - that not even the "lawsuit crisis" or the "insurance crisis" or other ill conceived rhetoric will let us take an easy way out.

We are convinced, therefore, that what is to be seen, will be seen; what is to be reasoned, will be reasoned; and what need be perceived, will be discerned. To this end we proceed.





### III

#### THE LAW - GENERALLY

##### A. WHAT IS NOT INVOLVED.

It is respectfully submitted that this Section 1983 claim is not:

1. an action based on Respondeat Superior;

2. an action which deals with random, unauthorized acts;

3. an action which is predicated on inadequate training; or

4. an action which seeks to impose individual liability.

##### B. WHAT IS INVOLVED.

It is your Plaintiff/Appellee's argument that there was a very definite policy of the City of Miami that caused the deprivation of the life and liberty of Doretha Rolle and the deprivation of her children and her mother's liberty and



property. Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984).

This policy was invalid and inadequate in that:

1. it prescribed the use of deadly force when same was impermissible to effectuate an arrest herein; and

2. it mandated that the chase continue or did not clearly allow for the discontinuation of the chase herein.

This Honorable Court itself clearly focused in on the issue in rather unmistakable terms.

Original Opinion - dated December 17, 1985:

\* \* \*

In the present case, the evidence showed that the City of Miami had in effect at the time of Mrs. Rolle's death express rules and regulations that (a) mandated that its police officers, on pain of disciplinary action against them, pursue fleeing suspects until apprehension, and (b) failed to provide for the abandonment of the pursuit when in the judgment



of the officer the continuation of the pursuit would involve a significant risk of injury or death for innocent members of the public or the officer.<sup>5/</sup> The evidence also revealed that because of this policy, the high-speed chase in the present case continued notwithstanding that, given the speeds and distances involved, innocent people were placed in obvious jeopardy and an innocent person--Mrs. Rolle--was actually killed.

(At pg. 4) (Emphasis supplied)

C. THE CONTEXT AND ORIGINS OF DANIELS V. WILLIAMS AND WHAT IT DID, IN FACT, OVERRULE.

Daniels v. Williams, deals exclusively with a random and unauthorized act, that is, Section 1983 individual liability due to the negligent act of placing pillows on a staircase. It does not in any manner address or affect the contours of municipal liability under Section 1983, which is set into motion whenever a policy is "the moving force behind a Constitutional violation". Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56



L.Ed.2d 611, 638 (1978). The Monell principle, aptly relied upon by this Court in its original opinion, has been in no way modified or overruled by Daniels, supra, because they each deal with different types of Section 1983 claims.

The origin of Daniels is the Supreme Court Decision in Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Notably, that case does not, nor does it (sic) progeny, Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) or Hudson v. Palmer, 468 U.S.\_\_\_\_, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983), deal with municipal liability. It is, however, possible to extrapolate some very valuable principles from them.

1. There is a substantial difference in the Constitutional sense between actions which are done pursuant to





Governmental procedures and those which are not;

2. When Governmental procedures are followed, Governmental liability should then follow when those procedures are inadequate or deficient to protect the individual's Constitutional rights; and

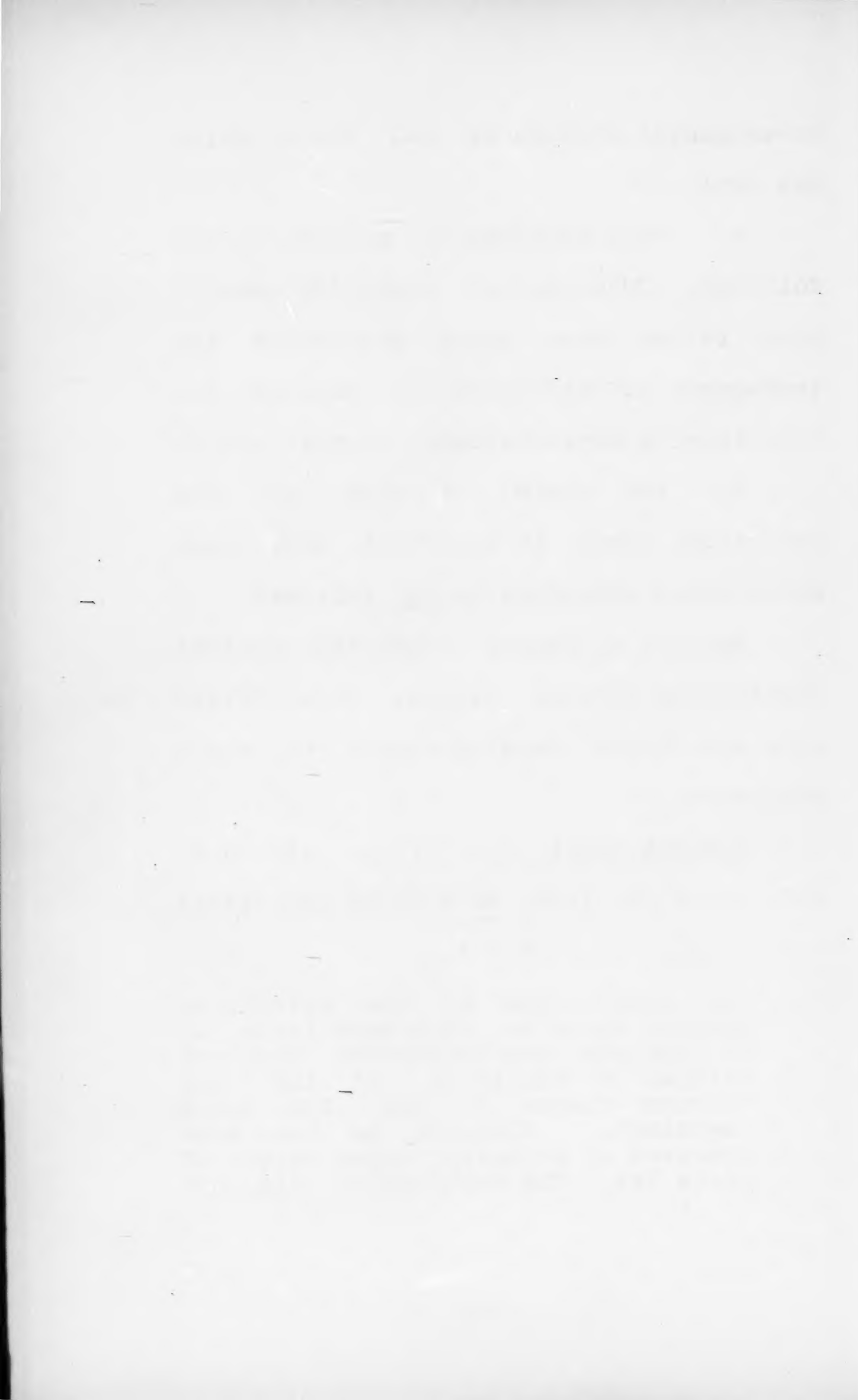
3. The state of mind of the individual actor is important only when established procedure is not followed.

Parratt v. Taylor makes the seminal distinction between random, unauthorized acts and those done pursuant to State procedure:

Parrott (sic) v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)

\* \* \*

[1c] Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not



occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate. . . (At 68 L.Ed.2d 433, 434) (Emphasis supplied)

In Logan, it was made clear that Parratt did not apply to deny liability where State procedure was followed:

Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)

This argument misses Parratt's point. In Parratt, the Court emphasized that it was dealing with "a tortious loss of ...property as a result of a random and unauthorized act by a state employee...not a result of some established state procedure." 451 US, at 651, 68 L.Ed2d 420, 101 S.Ct. 1908. Here, in contrast, it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference--whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. See id., at 545, 68 L.Ed 2d 420, 101 S.Ct. 1908 (second concurring opinion). Unlike the



complainant in Parratt, Logan is challenging not the commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards". (At 71 L.Ed. 2d 278) (Emphasis supplied)

Please note above how the state of mind is immaterial when it is the policy or procedure that is at issue.

In Hudson v. Palmer, 468 U.S.\_\_\_\_, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983) negligent and intentional unauthorized and random acts are put on the same footing.

Hudson v. Palmer, 468 U.S.\_\_\_\_, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1983)

\* \* \*

. . . The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.



\* \* \*

. . . For intentional, as for negligent deprivations of property by state employees, the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy. (At 82 L.Ed.2d 393) (Emphasis supplied)

Thus, under those cases, random, unauthorized negligent or intentional acts could have been the predicate for liability. It is this and only this aspect of Parratt and Hudson that is overruled by Daniels. Now a random, unauthorized act which is negligently committed cannot be a predicate for liability, while the intentional act can still be.

4. The adequacy of state procedures to prevent harm is critical to determination of liability.

Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984)

\* \* \*





[7,8] The "touchstone" of procedural due process is "protection of the individual against arbitrary action of government". *Wolff v. McDonnell*, 1974, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935. The goal of procedural due process analysis is to determine whether a state has provided adequate procedures to minimize efficiently the risk of arbitrary or erroneous deprivations of life, liberty, or property. (At pg. 336) (Emphasis supplied)

\* \* \*

In this case, as in *Parratt*, "[t]here is no contention that the procedures themselves are inadequate". (At pg. 337) (Emphasis supplied)

\* \* \*

In contrast, *Logan v. Zimmerman Brush Co.*, 1982, 455 U.S. 422, 102 S. Ct. 1148, 71 L.Ed.2d 265, involved a situation in which a property deprivation resulted from the operation of established state procedure. The Supreme Court held there that the availability of postdeprivation remedies was irrelevant to the question whether the deprivation occurred without due process of law. *Id.* at 435-36, 102 S.Ct. at 1157-56 (Majority opinion of Blackmun, J.); see also *Parratt v. Taylor*, 451 U.S. at 546, 101 S.Ct. at 1918 (Blackmun J., concurring). This holding is consistent with the *Parratt* analysis, for when a deprivation occurs as a result of the



established practice or procedure of a state agency, the result is predictable and the state has a constitutional duty to prevent it.  
(At pg. 337) (Emphasis supplied)

Ramos v. Gallo, 596 F. Supp 833  
(D. Mass 1984)

\* \* \*

A Fourteenth Amendment due process claim such as the one asserted by Ramos, may be analyzed as a claim for denial of either procedural or substantive due process, or both. A procedural due process claim alleges that the state has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. The claim focuses on the procedures used by the state in effecting the deprivation of liberty or property, which the claimant argues were inadequate in light of the significance of the interests involved. Schiller v. Strangis, 540 F.Supp. 605, 613 (D. Mass. 1982). Parratt and other cases discussed above invoke this analysis. (At pg. 837) (Emphasis supplied).

We respectfully submit that our analysis as to the effect of Daniels has recently been given judicial imprimatur in Mann v. City of Tucson Dept of Police, 782



F.2d 790 (9th Cir. 1986) - Decided after Daniels.

Mann v. City of Tucson Dept of Police, 782 F.2d 790 (9th Cir. 1986)  
(Concurring Opinion of Sneed, J.)

\* \* \*

In sum, Daniels and Davidson overruled that portion, and only that portion, of Parratt v. Taylor that held that a negligent loss of property by state officials acting under color of state law was a "deprivation" of property within the meaning of the Due Process Clause of the Fourteenth Amendment. . . .

. . . Therefore, I must be guided by this court's previously mentioned trilogy in which the rather clear message was "Apply Parratt only to random and unauthorized deprivations of property by state prison officers." See Haygood v. Younger, 769 F.2d at 1357. (At pg. 799) (Emphasis supplied)

Also instructive is King v. Massarweh, 782 F.2d 825 (9th Cir. 1986).

King v. Massarweh, 782 F.2d 825 (9th Cir. 1986).

\* \* \*

. . . The Supreme Court has overruled Parratt v. Taylor's holding that negligent deprivation of property

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implicate due process interests.  
Daniels v. Williams, \_\_\_\_\_ U.S. \_\_\_\_\_,  
106 S.Ct. 662, 88 L.Ed.2d \_\_\_\_\_ (1986).

Here, the appellants allege that they were deprived of liberty because they were taken into custody for up to two days and because personal property was taken from their apartments. However, there has been no showing that these deprivations occurred as a result of deliberate non-random state processes. (At pg. 828) (Emphasis supplied).

The rationale of holding a State liable when action is pursuant to its procedures is that the State has the time and the resources to draw proper and adequate safeguards. It is not random conduct, but the full power of the State that is brought to bear on the individual. Liability, therefore, would in no sense be a trivializing of the Constitution.

Mann v. City of Tucson Dept of Police, supra.

\* \* \*

I suggest that a satisfactory answer would commence with Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265





(1982). Thus, the first portion of the answer would be that the Parratt analysis is irrelevant to section 1983 claims based upon an alleged unconstitutional state law, policy, procedure, pattern, or practice. The basis for this rule would be that the state has forfeited its opportunity under its procedures to provide an appropriate remedy for wrongs having the state's own imprimatur. (At pg. 798) (Emphasis supplied)

In sum, Parratt, Logan, Hudson and Daniels are all specifically outside of the area of municipal liability for policy. They are really not necessary, individually, or in sum, to decide this case.

Although there are valuable teachings to be gleaned from them, the discussion was also included to forestall replies to this document which may tend to obfuscate otherwise clear categories of decisions in this field.

The responses heretofore of the CITY OF MIAMI take on the flavor of a smorgasbord of doctrines, with the picking here



and there of selective morsels put together on a plate to make a meal featured by an absence of memory of what the individual components tasted like.

Apparently, we will not have an opportunity to dispel the methodology heretofore used, and presumptively will be used again, which utilizes a chameleon approach to the facts of the case, which change to suit the legal doctrines sought to be applied. This can be said and is said in regard to the inapposite citation of cases and the subtle use of legal principles designed for clearly different circumstances. Their methodology is to create a whole of which this case does not constitute a part.

In short, this line of cases, outside the area of municipal liability, also provides analysis which supports our position herein. Same, however, should



not be factually misapplied. We now turn to that which is directly relevant, factually and legally.

#### IV

#### THE LAW - THE CONTOURS OF MUNICIPAL LIABILITY

##### A. THIS COURT RECOGNIZES THE REAL BASIS OF MUNICIPAL POLICY LIABILITY

In its initial Opinion herein, this Honorable Court clearly and succinctly stated the basis of municipal liability for its inadequate policy.

Original Opinion - dated December 17, 1985:

\* \* \*

Both parties agree that essential to recovery in a Section 1983 action against a municipality is a showing that the alleged constitutional deprivation flowed from an official policy or custom of the municipality, and that the policy or custom was "the moving force of the constitutional violation."<sup>4</sup> Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). A finding of a policy or custom is



necessary because it shows that the violation was "neither random nor unauthorized, but wholly predictable, authorized, and within the power of the [City] to control." Haygood v. Younger, 769 F.2d 1350, 1357 (9th Cir. 1985) (en banc). (At pg. 3) (Emphasis supplied)

This is the rationale employed in the analysis of the disparate treatment of random, unauthorized acts on the one hand and State procedures on the other.

B. THE COURT'S OPINION ON REHEARING LOSES SIGHT OF THE TRUE BASIS OF MUNICIPAL POLICY LIABILITY BY APPLYING DANIELS TO THIS AREA OF LAW

One of the very real problems generated by this Honorable Court's Opinion on Rehearing is an ambiguous measuring rod for municipal liability. Is this Honorable Court holding that the state of mind of the policy-makers is the test to be applied or is it holding that the standard is the import of the policy itself?





We respectfully submit that this problem is not addressed by this Honorable Court and the language of the Opinion itself engenders confusion.

COURT'S OPINION ON REHEARING -  
April 1, 1986

\* \* \*

The verdict for the plaintiffs below, following instructions that required the jury to consider whether the policy of the City in regard to police chases was adequate or inadequate, determined that the City's policy was "inadequate." The jury was not asked to consider, and the plaintiffs were not called upon to prove, whether in establishing this official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient. (At pg. 2-3) (Emphasis supplied)



Thus, a most difficult problem is facially engendered by this Honorable Court's Opinion on Rehearing as to the difference, if any, between measuring the degree of deficiency of a policy and measuring the state of mind of the policy-makers. What is to be measured? Can a POLICY PER SE be "negligent", "grossly negligent", "reckless", "grossly indifferent", or "willful"? The English language would appear to pretermitt the latter, though the import of a policy is, of course, not precluded.

We respectfully submit that neither standard is correct for determining a city's liability for its policy. The real underlying problem with this Honorable Court's current Opinion is that a new United States Supreme Court Opinion (Daniels) on an individual's liability or liability for random, unauthorized acts



has been mistakenly (and without any ratio decidendi) applied to a municipality's liability for its policy.

C. THE STATE OF MIND OF POLICY-MAKERS HAS NOTHING TO DO WITH MUNICIPAL LIABILITY - IT ONLY ALLAYS FEARS OF AN INCHMEAL DEMISE OF THE CIVIL RIGHTS ACT BY FINISHING IT AT ONCE.

Referring to the excerpt from the Opinion on Rehearing cited above, it is respectfully suggested that the attempt by this Honorable Court to measure the state of mind of the policy-makers as they promulgate the policy in question was never intended by the Supreme Court because it would signal the virtual demise of the Civil Rights Act. Such state of mind could hardly ever be the subject of available proof. The fundamental question in a Section 1983 suit grounded on municipal policy, as opposed to one based on a state employee's/random, individual actions, is whether or not an authorized

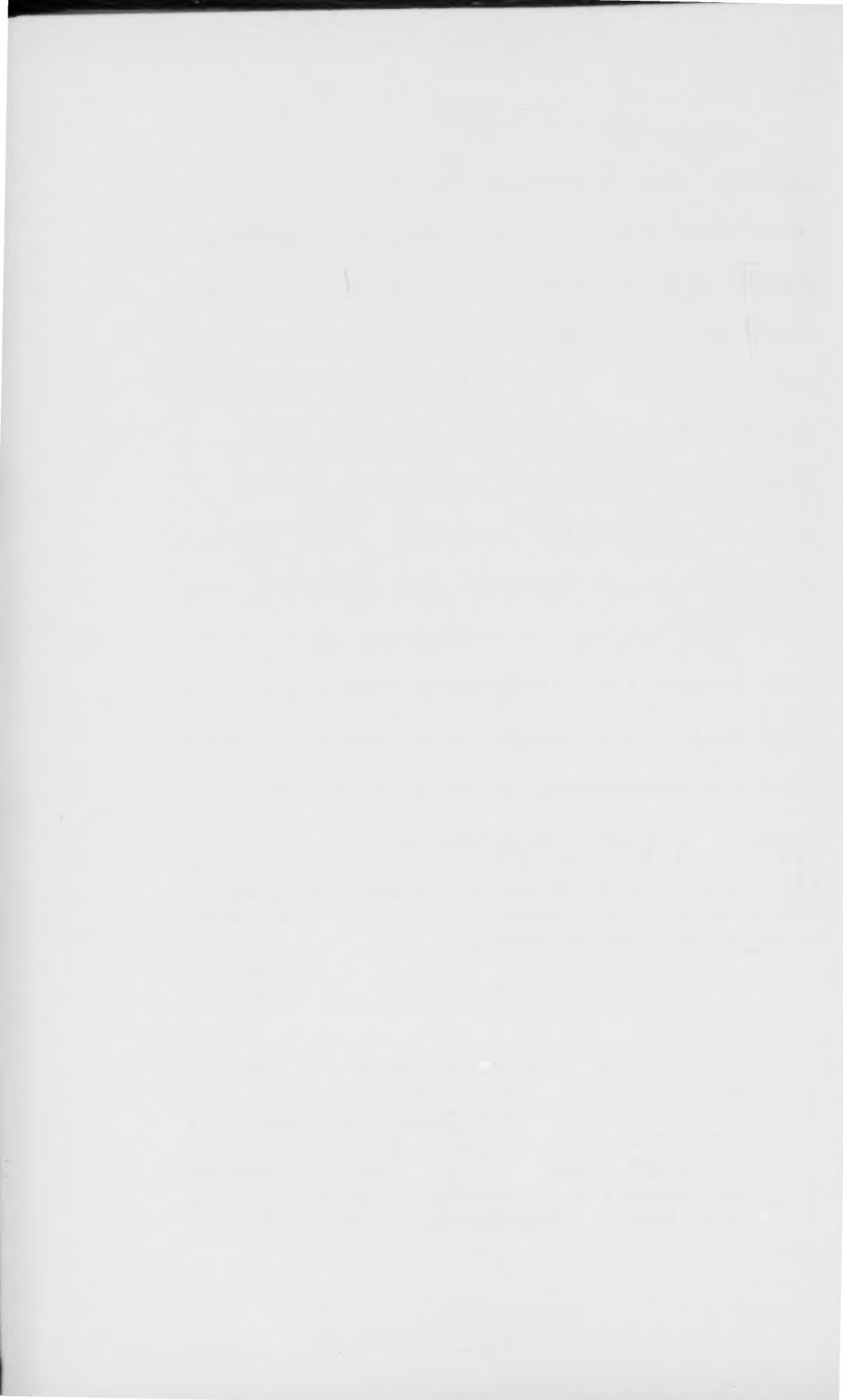


policy, when executed, results in loss of constitutional rights. See, e.g. Pembaur, supra; Monell, supra. It is this hallmark distinction between individual and municipal liability which lies at the heart of the decision in Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), wherein the Supreme Court would not grant a municipality any type of immunity in a Section 1983 suit, even though its individual officials may very well be cloaked with immunity when they act reasonably or in good faith.

Owen v. City of Independence, 445 U.S. 648, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (citing to Syllabus prepared by Reporter of Decisions, for ready reference by this Honorable Court)

\* \* \*

. . . The District Court, after a bench trial, entered judgment for respondents. The Court of Appeals ultimately affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, nevertheless





all the respondents, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

Held: A municipality has no immunity from liability under ( 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability.

\* \* \*

(d) Rejection of a construction of ( 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of ( 1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials--the injustice particularly in the absence of bad faith of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively--are less compelling, if not wholly



inapplicable, when the liability of the municipal entity is at issue.

The difference between suits against individuals in their personal capacity and suits against those individuals in their official capacity (governmental policy suits) is strikingly reaffirmed in Brandon v. Holt, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985); and Kentucky v. Graham, 473 U.S. \_\_\_\_, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

D. Pembaur v. City of Cincinnati,  
\_\_\_\_ U.S. \_\_\_\_, 54 L.W. 4290  
(March 25, 1986)

In Pembaur v. City of Cincinnati, supra, the Supreme Court found municipal liability to attach to an official county policy which was promulgated by a high County official, a County prosecutor, who authorized a forcible entry into plaintiff's place of business. At the time that the entry was carried out, this particular type of police conduct was

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permitted under Constitutional law. Prior to Supreme Court review of this Section 1983 action, the law governing forcible entry was changed. In addressing plaintiff's Section 1983 civil damage suit, the Supreme Court was only interested in whether the policy inflicted an injury or caused a Constitutional deprivation, and because it did, the state of mind or "wrongfulness" of the policy-maker would not be considered. In its decision on rehearing, this Honorable Court suggests that Daniels v. Williams, supra, calls for an examination of the policy-makers' conduct. Clearly, if Daniels was intended to have this effect, the Pembaur Court would have been obliged to dismiss plaintiff's action because it is clear that the policy-maker, by making policy in accordance with the law of forcible entry as it then existed, did not



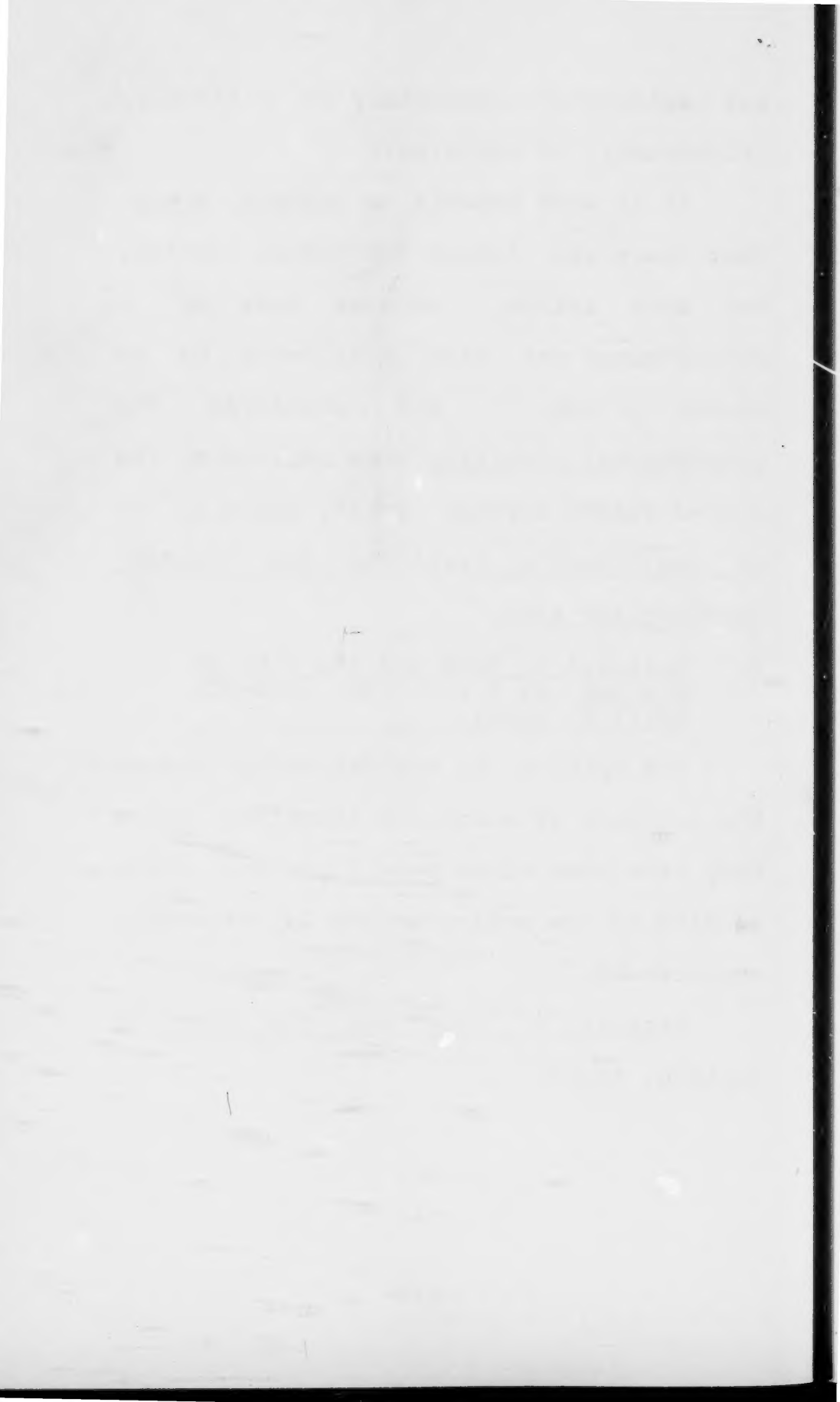
act negligently, recklessly or willfully.  
(Rightously, if anything!)

It is most notable in Pembaur, supra, that there was indeed individual action, but such action, because done by a policy-maker was also considered to be county policy. The standards for governmental liability were applied by the United States Supreme Court, not that of an individual's liability for random, unauthorized acts.

E. Mazzilli v. Doud and the City of Hialeah, 11 F.L.W. 732, (3rd DCA April 4, 1986)

The opinion of the majority leaves the contours of municipal liability where they have been since Monell and the state of mind of the policy-makers is noticeably unaddressed.

Mazzilli v. Doud and the City of Hialeah, supra.





\* \* \*

We affirm the directed verdict for the City on the plaintiffs' claim that the City violated their civil rights. Essential to any recovery in an action brought against a municipality under Title 42, United States Code, Section 1983, is a showing that the alleged constitutional deprivation flowed from an official policy or custom of the municipality, and that the policy or custom was "the moving force of the constitutional violation." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611, 638 (1978). Neither the evidence in this record,<sup>1</sup>/ nor the evidence which the plaintiffs assert was wrongfully excluded, shows that Doud's actions in shooting at and wounding the plaintiffs occurred as a result of such a policy or custom. (At pg. 733) (Emphasis supplied)

The concurring Opinion by Chief Judge Schwartz treats the question of intent only insofar as individual liability is concerned.

It is respectfully submitted that Daniels v. Williams, supra, does not necessitate nor does it license a marring of the "Bright Line" which divides the



various categories of Section 1983 cases, and hence, the Daniels ruling, in no way affects the present case and this Honorable Court's original holding.

V

MUNICIPAL LAW - WHERE THERE IS NO DEFINITE POLICY AND THE FAILURE TO TRAIN CASES

There are numerous cases which deal with state of mind where there is no definite policy and it is sought to imply policy by custom or by individual acts which should have been known by the policy-makers. There is sought to be established a policy of (intentionally or recklessly) having no policy. Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986); Cannon v. Taylor, 782 F.2d 947 (11th Cir. 1986); Gilmere v. City of Atlanta, 744 F.2d 1495 (11th Cir. 1985) (En Banc); Kibbe v. City of Springfield, 777 F.2d 801 (1st Cir. 1985).



This Honorable Court has clearly recognized that the case at bar does not fall under this category.

ORIGINAL OPINION - dated December 17, 1985:

5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, U.S. , 105 S.Ct. 2427, 85 L.Ed.2d 791. (At pg. 4) (Emphasis supplied)

VI

GARNER V. CITY OF MEMPHIS AND THE COURT'S CHARACTERIZATION OF THE POLICY HEREIN

In Memphis Police Department v. Garner, 471 U.S.\_\_\_\_, 105 S.Ct.\_\_\_\_, 85 L.Ed.2d 1 (1985), the United States Supreme Court squarely upheld the United States Court of Appeals determination that the use of force in circumstances such as herein was not permissible. We submit

1. The first part of the report is devoted to a general description of the project and its objectives. It also includes a brief review of the literature on the subject.

2. The second part of the report describes the methodology used in the study. This includes a detailed description of the experimental design, the subjects, the materials, and the procedures.

3. The third part of the report presents the results of the study. This includes a description of the data collected, the statistical analysis, and the conclusions drawn from the results.

4. The fourth part of the report discusses the implications of the findings and suggests directions for future research.

5. The final part of the report is a conclusion that summarizes the main findings and the overall contribution of the study.

The results of the study show that there is a significant difference between the two groups. The first group performed significantly better than the second group on the task. This suggests that the intervention had a positive effect on the outcome.

The findings of this study have important implications for the field. They suggest that the intervention used in this study is effective in improving the outcome. This information can be used to inform the development of future interventions and to guide the practice of the field.

Future research should focus on replicating the findings of this study and on exploring the mechanisms of the intervention. This will help to determine the generalizability of the findings and to identify the factors that influence the outcome.

that the holding of the Supreme Court in Garner, supra, is consistent with this Court's Original Opinion and the use of deadly force as used herein was found by the Supreme Court to be unconstitutional. Florida is mentioned in Footnote number 14 as following the common law rule on deadly force, which was specifically found to be Constitutionally impermissible. Garner involved the rights of a fleeing felon and not those of an innocent bystander. It was a 1983 action by the felon and the Court of Appeals utilized Fourth Amendment and due process analysis and the Supreme Court appears to only consider the Fourth Amendment aspect. It is hard to imagine that the rights of the felon are greater, rather than equal to or less than that of an innocent bystander. Day v. Lea, 599 F.Supp 25 (M.D. La. 1984). Therefore, although there may not have been a seizure





of the decedent herein within the Fourth Amendment, there is certainly a lack of due process attendant upon the deprivation of her liberty and the taking of her life, sans process.

Garner v. Memphis Police Dept.,  
710 F.2d 240 (6th Cir. 1983) (En Banc)

\* \* \*

An analysis of the facts of this case under the Due Process Clause of the Fourteenth Amendment leads us to a similar result. That clause prohibits any State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The right to life, expressly protected by the Constitution, has been recognized repeatedly by the Supreme Court as fundamental in the due process and equal protection contexts. (At pg. 246) (Emphasis supplied)

\* \* \*

The principles and distinctions we have enunciated here have been cast in the form of a rule by the American Law Institute in the Model Penal Code, a rule which accurately states Fourth Amendment limitations on the use of deadly force against fleeing felons:



The use of deadly force is not justifiable. . . unless (i) the arrest is for a felony, and (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and (iv) the actor believes that (1) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or (2) there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Model Penal Code (3.07(2)(b)  
(Proposed Official Draft, 1962).  
(At pg. 247) (Emphasis supplied)

It is without doubt that the chase have involved a substantial risk of injury to innocent persons. It is the absence of this Key Factor (Public Safety) in the City of Miami's policy which makes it impermissible and inadequate.

The Policies of The International Chiefs of Police and Metropolitan Dade County provided adequate role models for the jury.

This Honorable Court has aptly characterized the City of Miami's policy, thusly:

Original Opinion - dated December 17, 1985:



\* \* \*

That a policy of reckless disregard for human life is sufficient to sustain a Section 1983 action is clear from Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). There the jury found that the defendant-City was grossly negligent in the training of its officers and that, as a result of this negligence, its officers engaged in a shooting barrage which resulted in the death of an innocent victim. The court wrote that:

"[i]f there is a reckless disregard for human life and safety prevalent among the city's police officers which threatens the life and security of those whom they encounter, and if that recklessness is attributable to the instruction or example or acceptance of or by the city policymaker, the policy itself is a repudiation of constitutional rights. Where police officers know at the time they act that their use of deadly force in conscious disregard of the rights and safety of innocent third parties will meet with the approval of city policymakers, the affirmative link/moving force is satisfied."

767 F.2d at 170.



Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties. Moreover, the City's policy provided that an officer who failed to continue pursuit until apprehension would be disciplined. The police officers thus knew when they acted that their use of deadly force in the form of a speeding vehicle which threatened the rights and safety of innocent persons would meet with the approval of, and indeed was required by, the City policymakers. As such, municipal liability under Section 1983 was adequately shown. See also Jamieson v. Shaw, 772 F.2d 1205 (5th Cir. 1985) (where police set up deadman roadblock to stop driver of car who sped up and would not stop for police, and who, though known to have mental problems, did not have outstanding arrest warrants, innocent passenger in chased car injured when car crashed into roadblock had standing to sue municipality based on allegation that the police had a practice of ignoring the Fourth Amendment proscription against unreasonable seizures). Accord Trezevant v. Tampa, 741 F.2d 336 (11th Cir. 1984) (where plaintiff's wrongful incarceration resulted from procedures which failed to protect constitutional rights, municipal liability is warranted). (At pgs. 4-5) (Emphasis supplied)





## VI

### ADEQUATE AND INADEQUATE POLICY

It is respectfully submitted that the use of "adequate" and "inadequate" are proper nomenclature to describe permissible and impermissible Section 1983 municipal policy parameters.

Bartholomew v. Fischl,  
782 F.2d 1148 (3rd Cir. 1986)

\* \* \*

See, e.g., Brandon v. Holt, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985) (reversing finding of no municipal liability where plaintiff showed existence of a policy of police procedures inadequate to discover officer misconduct); Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) (imposing municipal liability based upon policy requiring that city employees' complaints be passed up "chain of command"); Black v. Stephens, 662 F.2d 181, 191 (3d Cir. 1981) (holding city liable because of policy delaying investigation of complaints of police misconduct until underlying charges against complainant were resolved)... (At pg. 1153) (Emphasis supplied)

Trezevant v. City of Tampa,  
741 F.2d 336 (11th Cir. 1984)



\* \* \*

[1] In the case at bar, Mr. Trezevant's incarceration was the result of numerous mistakes which were caused by the policemen and deputies carrying out the policies and procedures of the City of Tampa and the HBCJ. There was certainly sufficient evidence for the jury to find, as it did, that pursuant to official policy Officer Eicholz escorted Mr. Trezevant to central booking where he was to be incarcerated until the HBCJ personnel could process the paper work for his bond. We cannot view the actions of Officer Eicholz and the jailer in a vacuum. Each was a participant in a series of events that was to implement the official joint policy of the City of Tampa and the HBCJ.<sup>4</sup> The failure of the procedure to adequately protect the constitutional rights of Mr. Trezevant was the direct result of the inadequacies of the policy established by these defendants. The trial court correctly denied the motions for directed verdict and submitted the case to the jury.

(At pg. 340) (Emphasis supplied)

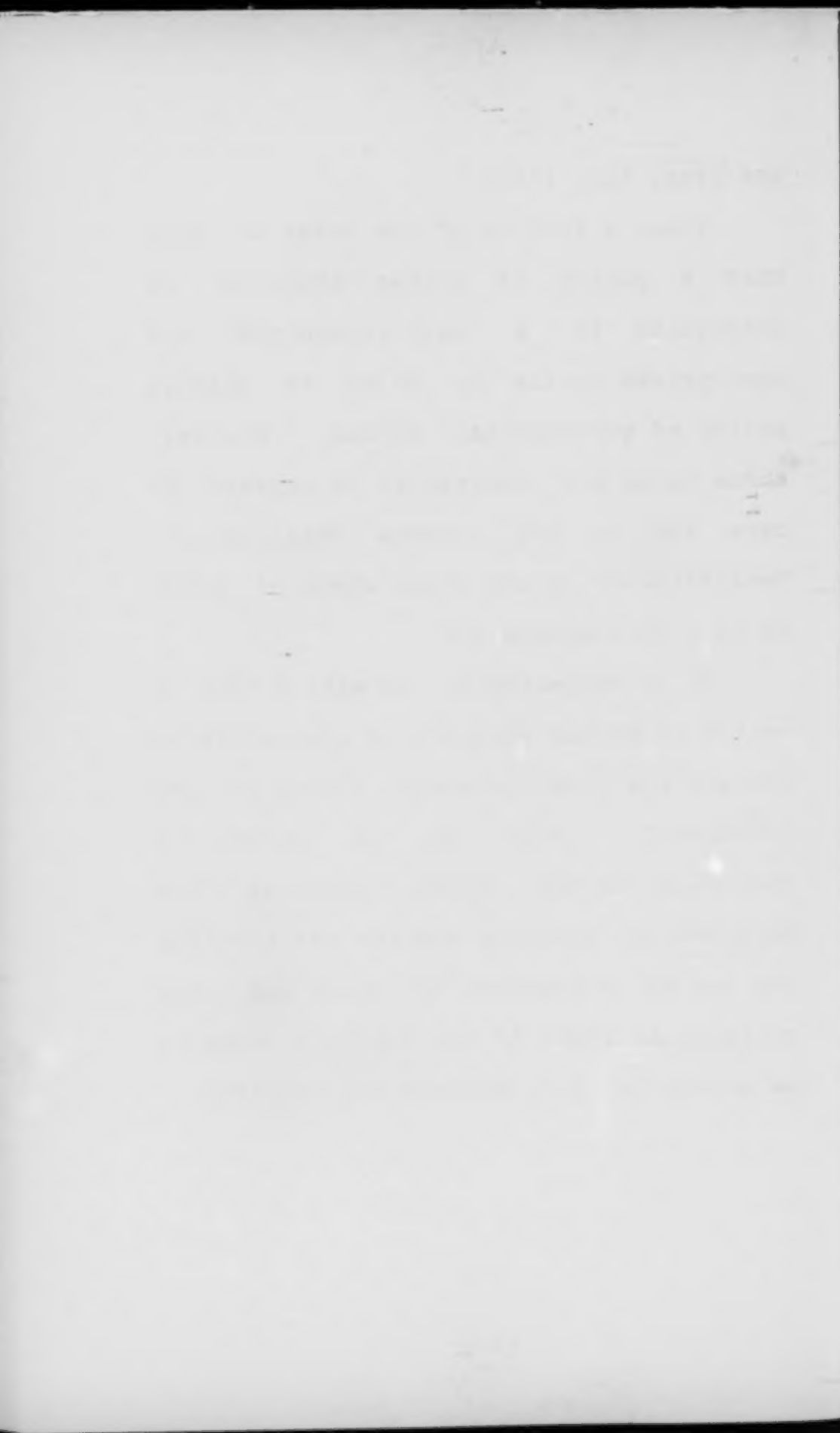
Please see also: Garris v. Rowland, 678 F.2d 1264 (5th Cir. 1982); Duchesne v. Sugarman, 566 F.2d 817 (2nd Cir. 1977); City of Amarillo v. Langley, 651 S.W. 2d



906 (Tex. App. 1983).

Thus, a finding of the trier of fact that a policy is either adequate or inadequate is a well-recognized and appropriate device by which to measure policy of governmental bodies. Moreover, these terms are neutral as to degrees of care and do not connote "Negligence", "willfulness" or any other state of mind, as well they should not.

It is respectfully submitted that a policy is either adequate or inadequate to protect the constitutional rights of the individual. This is, of course, a measuring device which balances the governmental activity and the availability and use of safeguards to carry out that activity in light of the public's right to be secure in their persons and property.



## VII

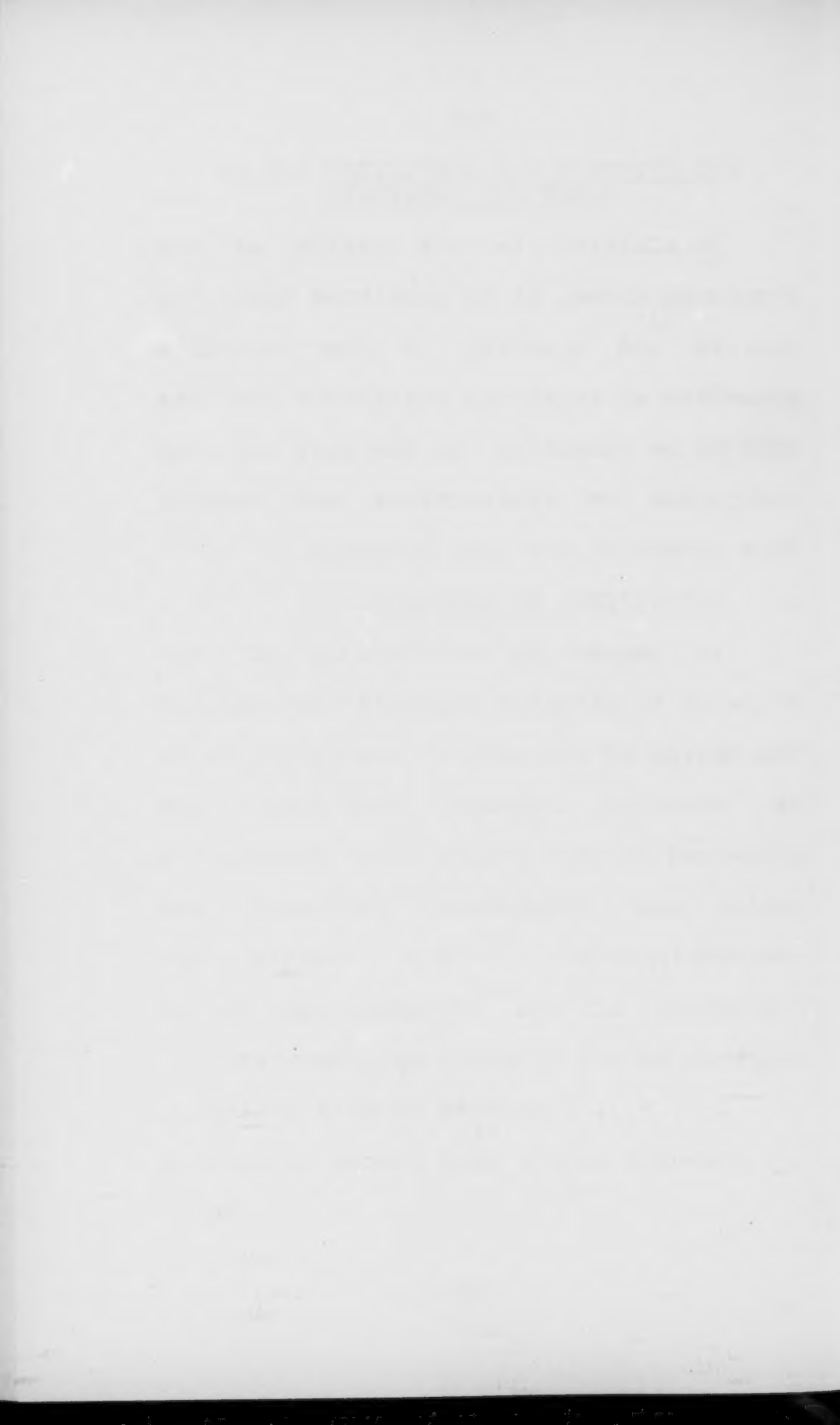
### THE EVIDENCE WAS SUFFICIENT AND NO ERROR WAS PRESERVED

In addition to the merits of the discourse above, it is submitted that the quality and quantity of the evidence presented at trial was sufficient for the case to be submitted to the jury and the unobjected to instructions and verdict form permitted the jury findings.

#### A. SUFFICIENCY OF EVIDENCE.

In regard to sufficiency of the evidence to defeat a directed verdict, if the degree of adequacy of the policy is to be examined, expert testimony was presented to the effect that Appellant's policy was "incredibly reckless" and "unconscionable". This Court's own evaluation of the evidence led it to conclude in its Original Opinion that:

1. ". . . because of this policy . . . innocent people were placed in obvious





jeopardy and an innocent person - Mrs. Rolle - was actually killed."

2. "Similarly, the City of Miami in the present case had a policy of pursuing fleeing suspects that failed to take into account the danger to innocent third parties." ("Similarly" therein was a comparison by this Court to the phrase "reckless disregard for human life" noted in the prior paragraph of the Court's Opinion).

If the state of mind of the policy-makers is to be judged, then it is obvious that without Watergate's Deep Throat behind closed doors, it would be impossible to prove by direct evidence. No governmental, policy-making official is going to admit that the policy was intended to cause death, or that "we just did not care if innocent bystanders were killed."



Practically, if state of mind is to be the test, then it could only be proved circumstantially. Herein, the direct testimony as to the "quality" of the policy and the Court's very own characterization of such indicates that there was sufficient evidence for the jury to infer the state of mind of the policy-maker and to characterize it as whatever it is that this Honorable Court is suggesting for liability to attach.

B. UNOBJECTED TO JURY INSTRUCTIONS  
AND VERDICT FORM - LIABILITY.

Once this Court is satisfied as to the sufficiency of the evidence, the next logical judicial examination should lead it to the jury instructions and verdict form.

As this Court is aware, Rule 1.470(b), Florida Rules of Civil Procedure, mandates that at the jury instruction Charge Conference "... all



objections shall be made . . ." and that "no party may assign as error the giving of any charge unless he objected thereto at such time. . ."

This Court has relentlessly enforced the clear meaning of this Rule, finding waiver of otherwise reversible error, e.g. Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3d DCA 1985) (Jury charged with wrong elements to sustain cause of action); Collard v. Keeton, 317 So.2d 121 (Fla. 3d DCA 1975) (failure to charge jury on comparative negligence); and Fleitas v. Robinson, 273 So.2d 419 (Fla. 3d DCA 1973) (permanently scarred plaintiff did not object to omission of "disfigurement" in damage charge).

The same standard has been applied to failure to object to a form of verdict. Whitmen v. Castlewood Int'l Corp., 383 So.2d 618 (Fla. 1980); General Motors

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committee on the 15th of the month

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Corp. v. Romine, 416 So.2d 2, (Fla. 3d DCA 1982); and Davis, Inc. & INA v. City of Miami, 400 So.2d 536 (Fla. 3d DCA 1981) (where the City of Miami could collect against insurance carrier who waived error as to the jury instructions and verdict form by failure to object).

It is uncontravertable that counsel for the Appellant, CITY OF MIAMI, did not object to the jury instructions in question or the verdict form.

In specific regard to the instructions, as to the standard for municipal liability, the following constitutes the relevant portions of the Charge Conference.

Objection on behalf of the Appellant is conspicuously absent.

Transcript of Proceedings

\* \* \*

THE COURT: There is no problem with that, but anyway--now, let's





get to the nitty-gritty of it.

Is whether or not the City of Miami had an inadequate policy in regard to police chases, and if so, whether such inadequate policy was a legal cause of the death of Doretha Rolle.

It seems to me to be right on point with what we have been talking about for the last four days.

MR. FELDMAN: That is the language employed by the supreme court in Monell.

THE COURT: Have you got a problem with that?

MS. CARDONNE: No, not as far as the wording. (T 835)

\* \* \*

THE COURT: All right.

So, that part is okay. Now, if the greater weight of the evidence does not support the claim of the plaintiffs in that the policy of the City of Miami was adequate or that the City of Miami--that the policy of the City of Miami was not a legal cause--

MR. MAGIDSON: It should be the policy of the City of Miami, or that the policy of the City of Miami was not a legal cause.

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THE COURT: Or that the policy of the City of Miami was not a legal cause of the death of Doretha Rolle, then your verdict on this claim, et cetera.

How about that?

MS. CARDONNE: That paragraph is okay.  
(T 836-837)

In regard to the causation issue under the Section 1983 Claim, again counsel for Appellant accepted without objection the "inadequate policy" concept (T 839-840).

In fact, counsel suggested to the Court that her proposed instruction quoting ( 1983 verbatim would assist the jury in their deliberations on the issue of inadequate policy. This requested instruction was therefore given.

Transcript of Proceedings

\* \* \*

MR. FELDMAN: Unless there is going to be--you know, I think the charge as given does define



what the constitutional violation is.

Now, using this, you are going to be giving them or attempting to make them scholars of the Constitution of the United States and I don't think it is possible.

MS. CARDONNE: Judge, I think it is an adequate, correct statement of what section 1983 is, which is not contained in any of their instructions.  
(T 857-858)

\* \* \*

THE COURT: I don't know. It just seems to me that plaintiffs' number four tells the jury what they have been listening to all week.

MS. CARDONNE: This is exactly right.

THE COURT: And that they had an inadequate policy in regard to chases and, if so, was it a cause of death.

MR. MAGIDSON: The Court is supposed (sic) to interpret the law and that is what the Court is doing, making the jury a constitutionally, scholarly group.

THE COURT: All right.



I am not saying it is a statement of the law. Every statement of the law does not have to go in. If I read them this, they are not going to have any idea of what I am talking about.

Deprivation of the rights and privileges and failing to protect her. Did they have a policy that was not good.

And, if so, was that policy the cause of her death. That is what we are talking about. We have been talking about it all week.

MR. MAGIDSON: That is what we are supposed to do.

Letting them know what it means, not leaving it to their whim.

MS. CARDONNE: We don't agree and then we ask that the exact statute, 1983, be read.

Somewhere in between jury instruction number four, which has been approved--

THE COURT: Let me see section 1983.

All right. I will read that.  
(T 858-859)

In regard to the verdict form, in all material respects, same was unobjected to

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In regard to the "damages" herein, only the Florida Standard Jury Instructions for Wrongful Death were given (6.5, 6.6, and 6.7). No other elements of damage were given to the jury for consideration, and again these instructions were agreed upon (T 874-881). If retried, the same instructions would be given again.

Therefore, it is respectfully submitted that in no instance has error been preserved (if existent) and thus, a new trial on any issue is unwarranted.

#### CONCLUSION

This Honorable Court has stated in its current Opinion that there was no consideration or proof that the policy-maker (the City) acted more than negligently, with either an intent to cause injury, or with reckless disregard.



We believe such an inquiry is irrelevant in order for Section 1983 liability to attach. Moreover, this Honorable Court has not stated that there was no proof as to the type of policy. The proof was directly to the effect that the City's policy was "incredibly reckless", and "unconscionable". (Testimony of Dr. Kirkham appearing at pgs. A 122-123, Appendix to Answer Brief of Appellee and hereinbefore in this Motion.)

This Honorable Court has characterized the policy of the City of Miami and the police action herein pursuant to that policy as in reckless disregard of the safety of the public.

It is hard to believe that in addition to all this, it is now necessary to go out and discern the state of mind of those who promulgated this policy.



It is submitted that the state of mind of the policy-makers is irrelevant in determining municipal liability.

It is respectfully submitted that the transmogrification by this Court of Section 1983 individual liability for random, unauthorized acts principles and its nomenclature (negligence, lack of due care, gross negligence, reckless disregard, intent, willfulness, etc.) to a Section 1983 municipal policy/liability setting is at odds with established and well-defined law of the Supreme Court.

The great concern of many that the Constitution will be trivialized by routine car accident suits in Section 1983 dress can have no countenance here:

1. The actions of the police officials were blatantly without regard to Mrs. Rolle's safety;

It is a very common thing to find  
that the light of the sun is not  
the same as the light of the moon.  
The light of the sun is very bright  
and the light of the moon is very  
faint. The light of the sun is  
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is very cold. The light of the sun  
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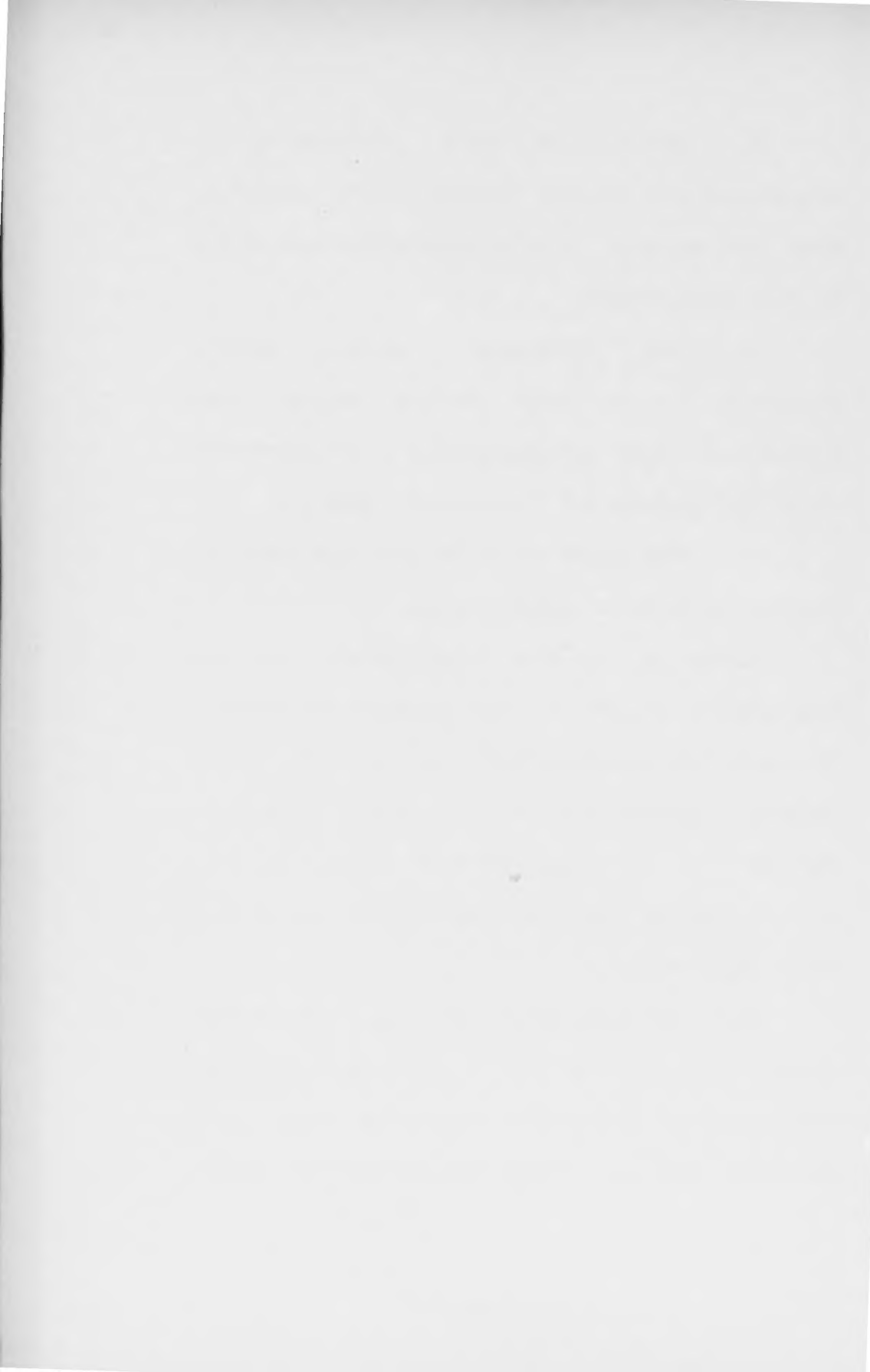
2. The police were performing an organized and highly specialized activity that was solely within the province of a Police Department;

3. The officers were acting pursuant to a city policy which was blatantly and inadequately unconcerned with the safety of civilians; and

4. The loss of life and the loss of family were most substantial.

Where it is the individual against the entire weight of the Government acting through its promulgated policy, it would indeed appear to trivialize society's values by minimizing the loss it has occasioned by setting impossible goals for full reparation.

The consequences of no respondeat superior liability for a municipality, has received no critical analysis nor case mention, but it would appear to be worth





at least a passing note. Because the traditional, easy manner of establishing liability, respondeat superior, is inapplicable regardless of how heinous the individual's conduct is, it is hard to justify further restrictions by making the policy parameter other than adequate or inadequate to protect Constitutional rights. It is only through a policy that a municipality can be liable. If, in fact, the state of mind of the policy-makers is the relevant examination, then the norm of Section 1983 practice would be to join all policy-makers, individually and personally. Pragmatically, in view of the elusive nature and imprecise daily application of the adverse party and adverse witness roles, each policy-making member of the body politic would be joined as an individual defendant. Also, a finding of recklessness would be



conclusive as to each person's individual liability, as well as the entity's liability.

We respectfully pray that this Honorable Court grant the Rehearing prayed for, recede from its Opinion on Rehearing, Reinstate its Original Opinion herein with a simple explanation that Daniels is inapplicable, or failing that, grant a Rehearing en banc and/or certify the cause to the Florida Supreme Court as passing on a question of great public interest.

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

Dated at Miami, Dade County, Florida,  
this 24th day of April, 1986.

/s/  
Donald Feldman



/s/

Charles M. Levy

Respectfully submitted,  
ABRAMSON & MAGIDSON, P.A.  
FELDMAN & LEVY, P.A.  
Attorneys for Appellee  
Suite 1700 Courthouse Tower  
44 West Flagler Street  
Miami, Florida 33130

By: /s/

Donald Feldman

By: /s/

Charles M. Levy

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing or For Rehearing En Banc, or Alternatively, For Certification to The Florida Supreme Court was this 24th day of April, 1986, mailed and/or hand-delivered to the following: Lucia Allen Dougherty, City Attorney and Gisela Cardonne, Deputy City Attorney, 169 East Flagler Street, Suite #1101, Miami, Florida 33131; Thomas M. Pflaum, Esq., Simon, Schindler, Hurst & Sandberg, 1492 South Miami Avenue, Miami, Florida 33130.

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FELDMAN & LEVY, P.A.  
Attorneys for Appellee  
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Miami, Florida 33130

By: /s/  
Donald Feldman

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IN THE DISTRICT  
COURT OF APPEAL  
OF FLORIDA

THIRD DISTRICT

THE CITY OF MIAMI, \*\*

Appellant, \*\*

vs. \*\* CASE NOS. 84-1679

84-2525

85-1352

GENEVA HARRIS, as \*\*

Personal Representa- \*\*

tive of the Estate \*\*

of Doretha a/k/a \*\*

Dorothea Rolle, \*\*

Deceased, \*\*

Appellee. \*\*

MOTION FOR REHEARING OR REHEARING EN BANC  
AND/OR CLARIFICATION OF OPINION ON SECOND  
MOTION FOR REHEARING AND/OR CERTIFICATION  
TO THE FLORIDA SUPREME COURT

COMES NOW Plaintiff/Appellee, GENEVA  
HARRIS, and respectfully requests that  
this Honorable Court grant a Rehearing or  
Rehearing En Banc and/or Clarification of  
Opinion on Second Motion for Rehearing  
and/or Certification to the Florida  
Supreme Court and for grounds would state

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that this Honorable Court has failed to consider and take into account critical and germane matter.

I

JURISDICTION

We are well aware of Florida Appellate Rule 9.330(b) and its one rehearing rule. This Motion for Rehearing does not fall within the restrictive purview of that Rule as it is an original Motion addressed to the particular decision of this Honorable Court dated June 3, 1986. "This second opinion on rehearing" charges the entire basis of the Court's previous ruling on Rehearing by writing an additional or supplementary opinion in the case.

HONORABLE COURT'S OPINION ON SECOND MOTION  
FOR REHEARING  
(June 3, 1986)

\* \* \*

This second opinion on rehearing  
is in response to the motion of



the plaintiffs-appellees. They complain that in the first rehearing (sought by the Defendant-City) we changed from affirming to reversing the Section 1983 judgment for the plaintiffs in erroneous reliance on the subsequently decided Daniels v. Williams, 474 U.S. \_\_\_\_\_, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), which, they argue, applies to cases involving the liability of individuals only, not to cases, as here, involving the liability of municipalities based on municipal policy. Without now debating the merits of the plaintiffs' argument, we note that in the still more recently decided case of Pembaur v. Cincinnati, \_\_\_\_\_ U.S. \_\_\_\_\_, \_\_\_\_\_, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452, 465 (1986), a plurality of the Court held "that municipal liability under Section 1983) attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." There being no such proof adduced by the plaintiffs, the judgment in their favor must be reversed. However, because this failure of proof is attributable to the plaintiffs' having proved only that required by the law at the time of trial, they will



have an opportunity to supply the missing proof upon a retrial of the case. With this clarification, we adhere to our opinion on rehearing filed in this cause on April 1, 1986.  
(At pgs. 1-2) (Emphasis supplied)

The Court has articulated an entirely new rule of law governing this case and has imposed an entirely new burden on GENEVA HARRIS to meet at a new trial.

Therefore, this Motion For Rehearing which is directed specifically to this Honorable Court's Decision on Second Motion for Rehearing is permissible.

Dade Federal Savings & Loan Association v. Smith, 403 So.2d 995 (Fla. 1st DCA 1981)

ON FURTHER MOTION FOR REHEARING

\* \* \*

[6] Appellee has filed a motion to reissue mandate in this cause (which was recalled upon the filing of the second motion for rehearing) contending that the second motion for rehearing is not permissible. Florida Appellate Rule 9.330(b), relating to motions for





rehearing or clarification,  
states as follows:

"A party shall not file more  
than one such motion with  
respect to a particular  
decision."

Here, in ruling upon appellant's  
first motion for rehearing, we  
found it necessary to, and did,  
change the entire basis for our  
previous ruling, writing a  
supplementary opinion in the  
case. Since that opinion  
changes the entire basis for the  
ruling of the first opinion, we,  
therefore, consider it to be a  
new decision to which a new  
motion for rehearing may be  
filed.

The motion for rehearing is  
denied.

(At pg. 999) (Emphasis supplied)

## II

### WHAT STANDARD

#### A. The Daniels Standard:

#### HONORABLE COURT'S OPINION ON REHEARING

(April 1, 1986)

\* \* \*

. . .The jury was not asked to  
consider, and the plaintiffs  
were not called upon to prove,  
whether in establishing this

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official policy the City acted more than negligently, that is, either with an intention to cause injury to or loss of life, liberty or property, or with a reckless disregard of whether such a policy would cause injury to or loss of life, liberty or property. At the time of trial, the plaintiffs could have sufficiently proved the City's liability under Section 1983 by merely showing that its official policy was a negligent one. At the present time, that quantum of proof is not sufficient.

\* \* \*

They should be given the opportunity, under Daniels, to prove the "more than negligence" that Daniels requires."

(At pgs. 2-4) (Emphasis supplied)

B. The Pembaur Standard:

HONORABLE COURT'S OPINION ON  
SECOND MOTION FOR REHEARING  
(June 3, 1986)

. . . Pembaur v. Cincinnati,  
U.S. 106  
S.Ct. 1292, 1300, 89 L.Ed.2d  
452, 465 (1986), a plurality of  
the Court held "that municipal  
liability under Section 1983  
attaches where--and only  
where--a deliberate choice to  
follow a course of action is  
made from among various



alternatives by the official or  
officials responsible for  
establishing final policy with  
respect to the subject matter in  
question."

\* \* \*

. . .they will have an  
opportunity to supply the  
missing proof upon a retrial of  
the case.

(At pg. 2) (Emphasis supplied)

It is entirely unclear from this  
Honorable Court's Opinion above whether  
GENEVA HARRIS will be required to prove  
"more than negligence by the policymakers"  
(state of mind) or "a deliberate choice to  
follow a course of action from among  
various alternatives" by these same  
policymakers. It is conceivable that  
because of the phrasing of this Honorable  
Court's Opinion on Second Motion For  
Rehearing, she will be required to prove  
both. ("Without now debating the merits  
of the plaintiffs' argument. . .with this  
clarification, we adhere to our opinion on



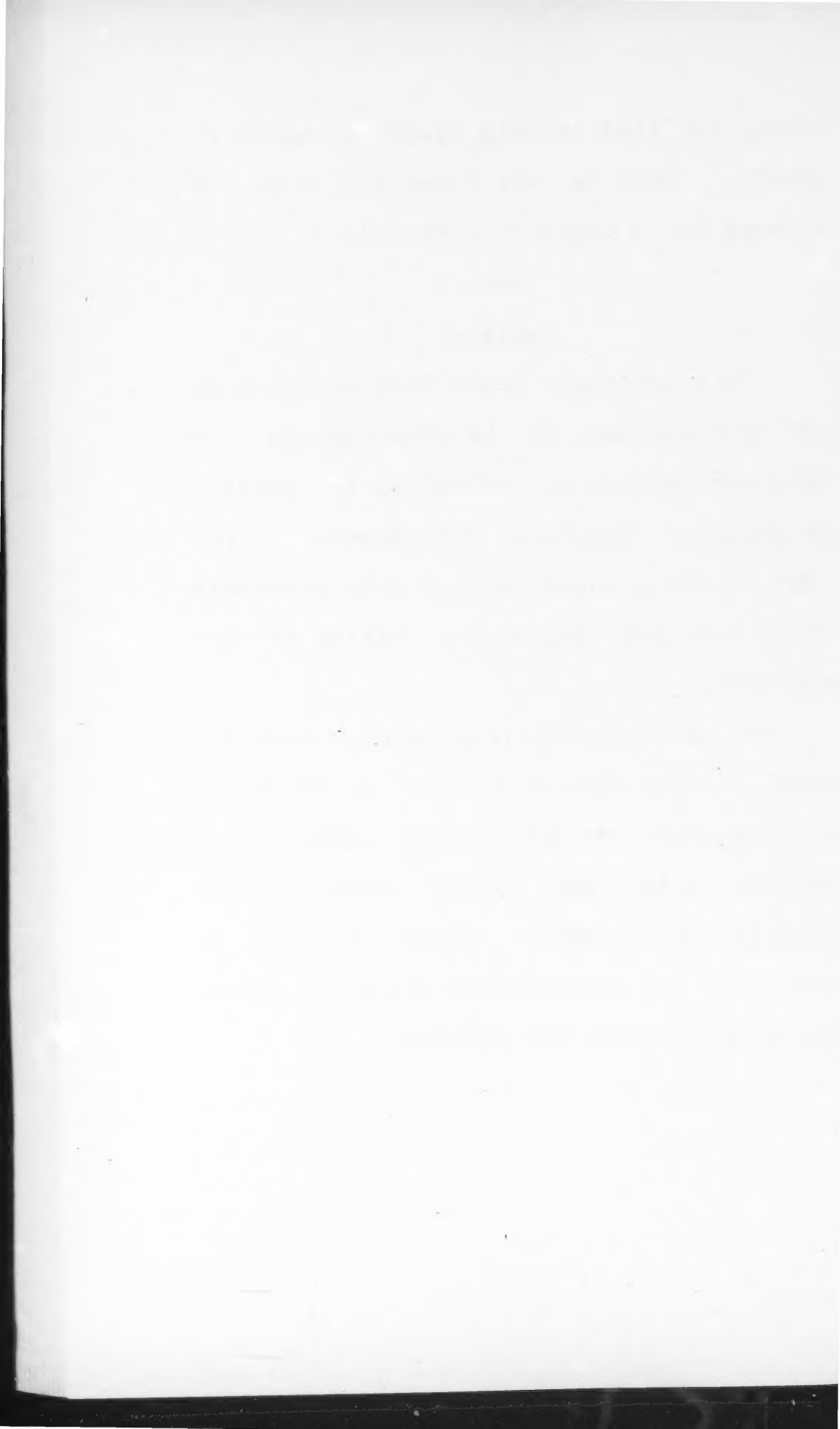
rehearing filed in this cause on April 1, 1986"). What is clarified and what is adhered to is impossible to tell.

### III

#### Daniels

This Honorable Court does not clearly indicate whether it is adhering to its Original Opinion on Rehearing in regards to Daniels' applicability herein. The best we can discern is that this Honorable Court will not debate the merits of our argument.

It is respectfully submitted that the Panel of this Honorable Court is aware of our argument, can evaluate it without any further help, and should clearly hold Daniels inapplicable. Other members of the Court are respectfully directed to our previous PETITION FOR REHEARING, etc.





#### IV

Pembaur: One Instance Of Conduct  
(Single Decision v.  
Express Rule and Regulations)

It is virtually impossible to write that which follows because we truly and humbly submit that it should never need be written.

In this regard the Panel of this Honorable Court has previously held that the policy of The City of Miami in regard to police chase was established by express rules and regulations.

ORIGINAL OPINION OF THIS HONORABLE COURT  
(December 17, 1985)

5/ Because the existence of the City's policy relating to high-speed chases is proved by an express rule and regulation, we need not concern ourselves with the question whether evidence of an incident combined with subsequent non-action by the City would be sufficient to prove circumstantially the existence of the policy. See Oklahoma City v. Tuttle, U.S. \_\_\_\_\_, 105 S.Ct. 2427, 85 L.Ed.2d 791.  
(At pg. 4) (Emphasis supplied)



This was similarly the case in Monell. Is it to be imagined that Pembaur would now require Mrs. Monell, if decided today, to show that "a deliberate choice to follow a course of action is made from various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question"?

It is submitted that the existence of the written policies and procedures in Monell, which were designed to apply in all instances, would make such an inquiry meaningless.

However, if, as suggested herein, it must be shown that the actual policy makers were aware of all, or most, or some of the alternatives when they established their actual policy, the Monell and Pembaur courts would be most shocked.



It is respectfully submitted that this Honorable Court is, indeed, again putting a state of mind requirement into municipal policy making liability. Daniels would not dictate or allow this, nor would Monell or Pembaur.

We are now back into the prohibited state of mind inquiry pretermitted by Owen vs. City of Independence; Brandon vs. Holt; and Kentucky vs. Graham.

Pembaur was clearly not concerned with states of mind of policymakers, except to determine when it was that a policy was actually being made by an individual acting in one particular situation; making a decision (policy) on the telephone. The Court was concerned with determining when an individual action or decision rose to the level of policy (afortiori, when no expressed rule or regulation previously existed).



Justice Brennan speaking for the clear majority of the court directly stated the issue, comparing it to Monell.

Pembaur v. Cincinnati,  
U.S., 106 S.Ct.  
1292, 89 L.Ed.2d 452 (1986)

\* \* \*

Justice Brennan delivered the opinion of the Court, except as to Part II-B.

[1a] In Monell v. New York City Dept. of Social Services, 436 US 658, 56 L Ed 611, 98 S Ct 2018 (1978), the Court concluded that municipal liability under 42 USC Section 1983 [42 USCS Section 1983] is limited to deprivations of federally protected rights caused by action taken "pursuant to official municipal policy of some nature. . ." Id., at 691, 56 L Ed 2d 611, 98 S Ct 2018. The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy this requirement.

(At 89 L.Ed.2d pg. 457)  
(Emphasis supplied)

The majority opinion in Pembaur goes on to clearly show that liability in Monell was pursuant to a written policy





which was to be followed consistently over time (that sub judice)

Pembaur v. Cincinnati, supra.

\* \* \*

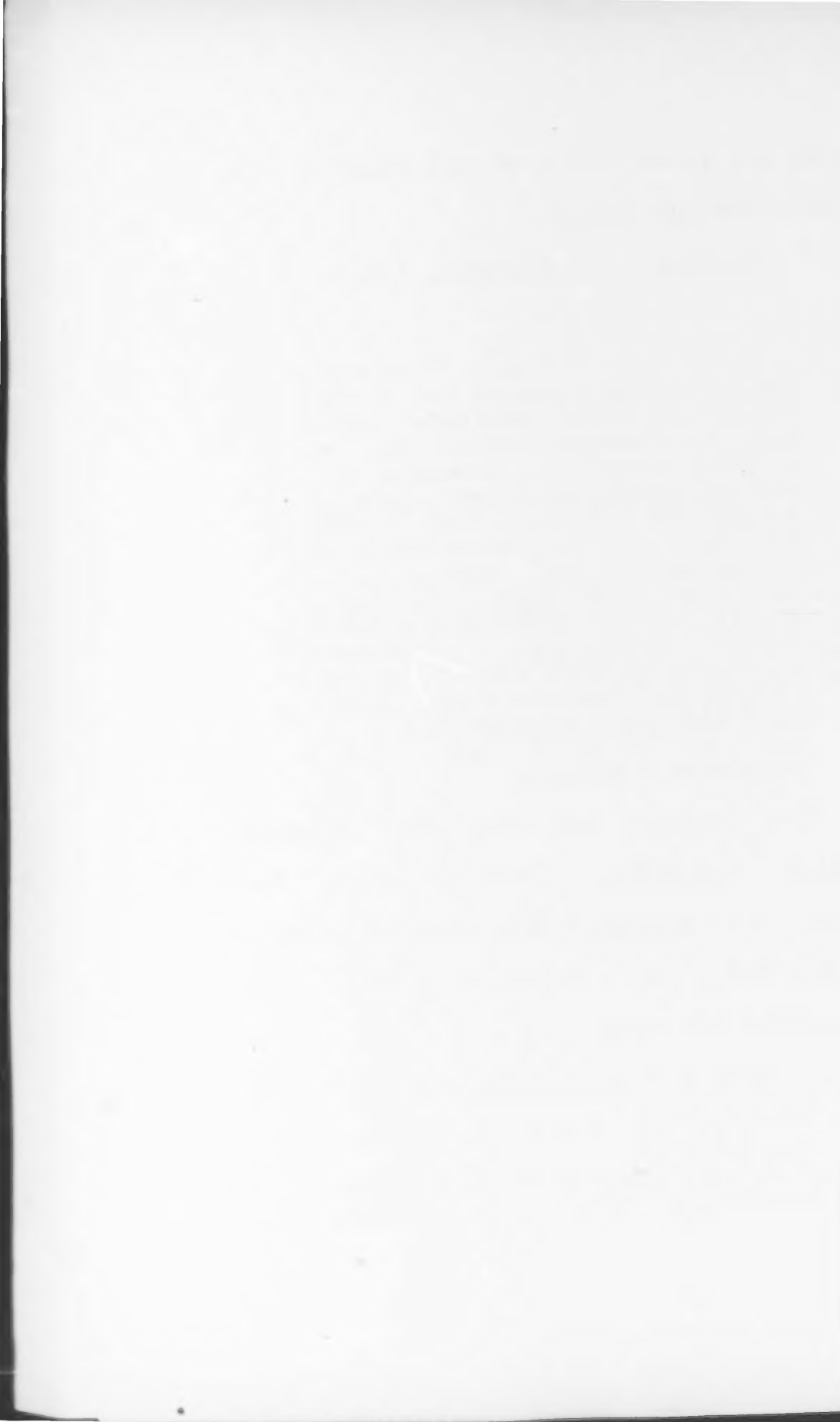
. . .to be sure, "official policy" often refers to formal rules or understandings--often but not always committed to writing--that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in Monell itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary.  
(At 89 L.Ed.2d pg. 462)  
(Emphasis supplied)

The Pembaur majority then extends Monell; expanding its contours for liability to singular decisions by single individuals (an expressed rule or regulation was absent).

Pembaur v. Cincinnati, supra.

\* \* \*

. . .That conclusion is entirely consistent with our holding



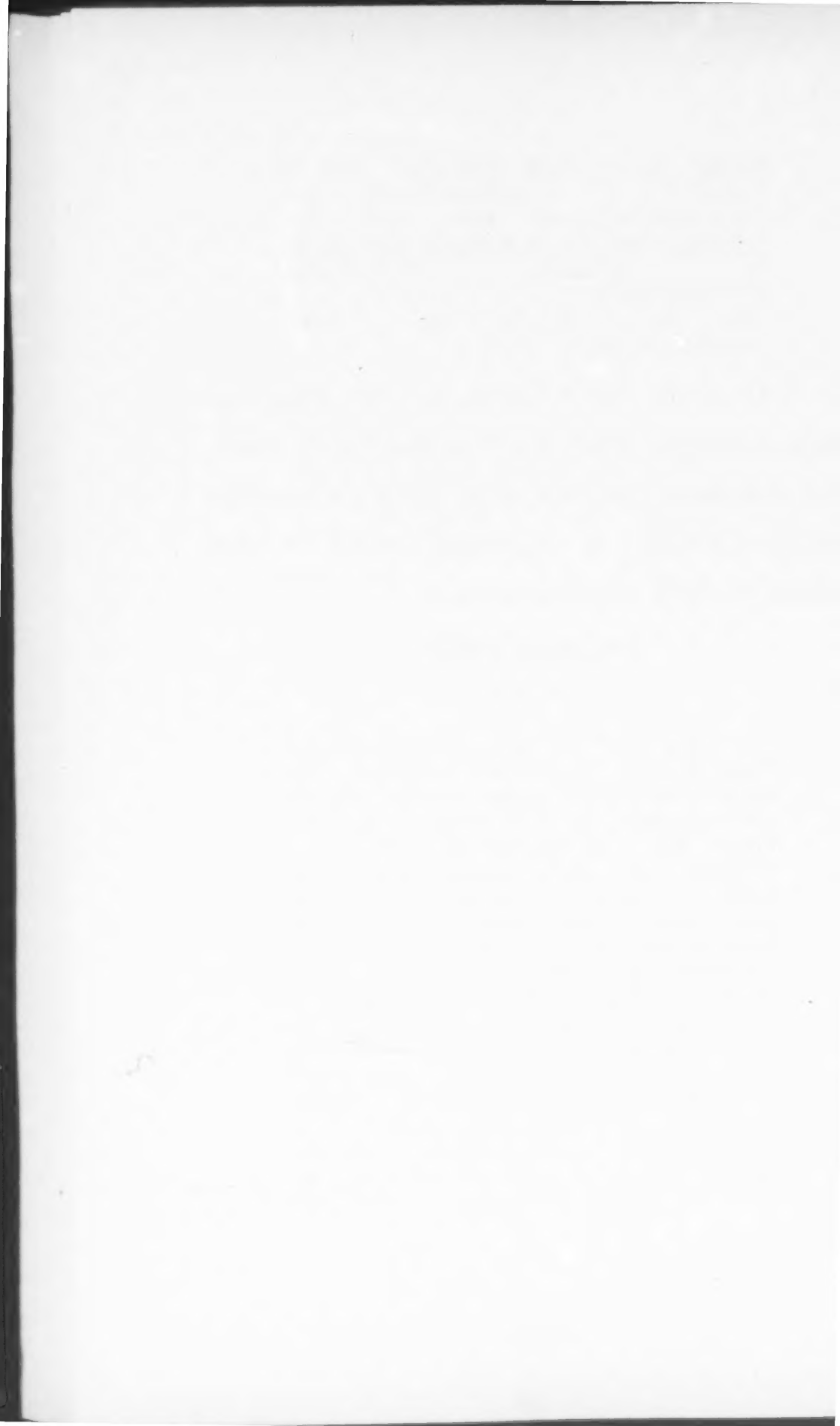
today that the policy which ordered or authorized an unconstitutional act can be established by a single decision by proper municipal policymakers.  
(At 89 L.Ed.2d pg. 465)  
(Emphasis supplied)

It is in this context, and only in this context, that the Supreme Court made the statement relied on by this Honorable Court, to-wit: "deliberate choice -- from among various alternatives."

Pembaur, supra.

\* \* \*

. . .To hold a municipality liable for actions ordered by such officers exercising their policy-making authority is no more an application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the city councils in Owen and Newport. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under Section 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various



alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See Tuttle, supra, at \_\_\_\_\_, 85 L Ed 2d 791, 105 S Ct 2427 ("'policy' generally implies a course of action chosen from among various alternatives").

(At 89 L.Ed.2d pg. 465)  
(Emphasis supplied)

We respectfully submit that to take Pembaur, which is probably the single most expansive decision on municipal liability since Monell and Owens, written by the Justice who is consistently the most vocal and consistent advocate of expanding the contours of municipal liability, and turn it into a small noose to choke off municipal culpability -- would suggest that which follows.

V  
Justice Must Have The Appearance of  
Justice  
(Not a "Debate")

In this great land of individual liberty, we have the right not only to



justice, but also the appearance of justice. Justice is not good enough if it does not appear to be such.

We have strenuously objected to the procedures followed by this Honorable Court:

1. It appears to have countenanced a blatant abuse of the Florida Rules of Appellate Procedure by The City of Miami subsequent to the appearance of entirely new counsel, after this Honorable Court's original opinion. The City of Miami's new counsel filed its Petition for Rehearing and we asked this Honorable Court to strike same. Sag Harbour Marine v. Fickett, 484 So.2d 1250 (Fla. 1st DCA 1986) well states our point.

2. Not only have we objected to the City of Miami's conduct, but we also stated a dissatisfaction with the entire procedure utilized by this Honorable Court





by not allowing HARRIS an opportunity to comment on Daniels before this Honorable Court applied it herein:

Motion For Rehearing For Rehearing En Banc Or Alternatively For Certification To the Florida Supreme Court  
(Set forth here for ready reference)

\* \* \*

II  
A BIT OF CANDOR  
OR  
WHY BOTHER

A. AFTER THIS HONORABLE COURT'S OPINION OF DECEMBER 17, 1985:

1. December 31, 1985 (Amended January 7, 1986): The CITY OF MIAMI filed a Motion for Rehearing En Banc, or Alternatively, for Certification to the Florida Supreme Court.

This document was filed by totally new counsel and it was as if the entire appellate procedure was first beginning (or being re-written).

It was thought that this document was abusive, irreverent, and fallacious, at least in patent disregard of the Florida Appellate Rules;

2. January 7, 1986: GENEVA HARRIS filed her "Response to and Motion to Strike, etc."

To the best of our

1

1

knowledge, this Honorable Court has not addressed this document;

3. January 13, 1986: CITY OF MIAMI filed its Reply to Appellee's Motion to Strike.

This document just reenforced the prior infirmities of the Motion for Rehearing, etc. and was even more blatantly in violation of the Florida Appellate Rules;

4. January 29, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority which listed cases, the latest of which was decided at least five (5) years prior to oral argument of this cause;

5. February 3, 1986: The CITY OF MIAMI filed a Notice of Supplemental Authority (Daniels v. Williams and Davidson v. Cannon).

As the cases were decided January 26, 1986, it could not be argued that this was improper;

6. February 27, 1986: The CITY OF MIAMI filed its Supplemental Memorandum giving its formal "PRESUMPTUOUS" opinions on Daniels and Davidson. This, once again in clear violation of the Florida Appellate Rules; and

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LIBRARY

1. The first part of the book is devoted to a general survey of the history of the subject. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are presented in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

2. The second part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are presented in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

3. The third part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are presented in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

4. The fourth part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are presented in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

5. The fifth part of the book is devoted to a detailed examination of the various theories which have been advanced. It begins with a discussion of the early attempts to explain the origin of life, and then proceeds to a more detailed examination of the various theories which have been advanced. The author's own views are presented in a clear and concise manner, and are supported by a wealth of references to the literature of the subject.

7. April 1, 1986: This Honorable Court entered its Order on Rehearing.

B. AT PRESENT:

1. GENEVA HARRIS is now in the position of having, not to help direct an opinion (which is her right) but of trying to undo what has already been written for all to see. To convince this Court that which has now been twice done is wrong, rather than to argue what is once done is right, is an unfair, but a present burden, which we most strongly object to.

2. Frankly, there is a very strong temptation to just let be, what is. But, the consequences of leaving this opinion as it is, are perceived to be so great--a very real and unwarranted death in this District and for these Plaintiffs of Section 1983 - that not even the "lawsuit crisis" or the "insurance crisis" or other ill conceived rhetoric will let us take an easy way out.

We are convinced, therefore, that what is to be seen, will be seen; what is to be reasoned, will be reasoned; and what need be perceived, will be discerned. To this end we proceed.

(At pgs. 11-12) (Emphasis supplied)



Instead of addressing and resolving the arguments presented, this Honorable Court states: "WITHOUT NOW DEBATING THE MERITS OF THE PLAINTIFF'S ARGUMENT. . ."

We verily believe that the use of the word "Debating", rather than for example "addressing", "considering" or "resolving" might tend to indicate an adversarial, rather than an adjudicatory posture of the Court.

We further verily believe that to then immediately resolve this case on the "still more recently decided case of Pembaur v. Cincinnati - - -" without any ratio decidendi by this Court and solely on the basis of a quote taken completely out of its intended context, does little to add to the appearance of justice.

We do believe that it may well be that appearance is not fact, but we must also note that the tenor of the Court's





most recent opinion appears defensive.

It must be stressed that the Policy of the City of Miami was not an ad hoc one, but was formally adopted and in writing. There is a Manual of Rules and Regulations. There is also a General Orders of the Miami Police Department. These documents bear the names amongst others of: Bernard L. Garmire, Chief of Police; Walter E. Headley, Chief of Police; P.W. Andrews, City Manager; and M.L. Reese, City Manager. It is virtually impossible to tell which of these introduced, readopted, ratified, or retained any particular directive or order. Please see: Plaintiffs' Exhibits 2 and 3; Motion to Supplement the Record (3 September 1985); Order granting said motion (5 September 1985); and the record as supplemented.



We respectfully submit that the Panel decision now lays an additional burden on GENEVA HARRIS, one which is probably impossible to meet by proof.

#### CONCLUSION

We respectfully submit that this Honorable Court's reliance on Daniels was inapposite and its reliance on Pembaur was inappropriate. GENEVA HARRIS and the decedent's minor children should be allowed to receive the benefits which this Honorable Court's original opinion recognized, obtained pursuant to a trial fairly and legally conducted. As we are not Constitutional scholars, we cannot and have no desire to debate this Honorable Court. We only hope that we have ably advised the Court of our understanding of the applicable law.

We express a belief, based on a reasoned and studied professional



judgment, that the Panel decision is of exceptional importance.

Dated at Miami, Florida, this 10th day of June 1986.

By: /s/  
Donald Feldman

By: /s/  
Charles M. Levy

Respectfully submitted,  
ABRAMSON & MAGIDSON, P.A.  
FELDMAN & LEVY, P.A.  
Attorneys for Appellee  
Suite 1700 Courthouse Tower  
44 West Flagler Street  
Miami, Florida 33130  
(305 374-0007

By: /s/  
Donald Feldman

By: /s/  
Charles M. Levy

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing, etc. was this 10th day of June 1986, mailed to the following:



Lucia A. Dougherty, City Attorney  
Suite 1101, 169 E. Flagler Street  
Miami, Florida 33131;

Thomas M. Pflaum, Esq.  
Simon, Schindler, Hurst & Sandberg  
1492 South Miami Avenue  
Miami, Florida 33130.

FELDMAN & LEVY, P.A.  
Attorneys for Appellees  
Suite 1700 Courthouse Tower  
44 West Flagler Street  
Miami, Florida 33130  
Telephone No. (305)374-0007

By: /s/  
Donald Feldman





IN THE CIRCUIT COURT  
OF THE 11TH JUDICIAL  
CIRCUIT, IN AND FOR  
DADE COUNTY, FLORIDA

GENERAL JURISDICTION  
DIVISION

CASE NO. 82-7845  
(CA-30)

GENEVA HARRIS,  
as Personal Rep-  
resentative of the  
Estate of DORETHA  
ROLLE, Deceased,  
  
Plaintiffs,

v.

CITY OF MIAMI, a  
municipal corpora-  
tion,

Defendant.

---

FINAL JUDGMENT IN  
FAVOR OF GENEVA  
HARRIS, AS PERSONAL  
REPRESENTATIVE OF THE  
ESTATE OF DORETHA  
ROLLE, DECEASED, ON  
BEHALF OF SURVIVORS,  
DERRECK S. ROLLE,  
AARON ROLLE, GLENDORA  
D. ROLLE AND GENEVA  
HARRIS AND AGAINST THE  
CITY OF MIAMI, A  
MUNICIPAL CORPORATION.

This is a FINAL JUDGMENT in favor of  
GENEVA HARRIS, as Personal Representative  
of the Estate of DORETHA ROLLE, deceased,  
on behalf of survivors, DERRECK S. ROLLE,  
AARON ROLLE, GLENDORA D. ROLLE and GENEVA  
HARRIS and against the CITY OF MIAMI, a  
municipal corporation.



This cause was tried by and through a Jury Trial between May 29, 1984 and June 1, 1984. On June 1, 1984, this matter was submitted to a Jury and resulted in a verdict in favor of the Plaintiffs and against the Defendant, as follows:

WE, THE JURY, return the following verdict.

1. Did the City of Miami have an inadequate policy in regard to police chases that was a legal cause of the death of DORETHA ROLLE?

YES   X   NO       

2. Was there negligence on the part of the City of Miami which was a legal cause of the death of DORETHA ROLLE?

YES   X   NO       

If your answers to both of the above questions are "NO", then your verdict is for the Defendant and you should not proceed further except to date and sign this verdict form and return it to the Courtroom.



If your answer to either of the above questions is "YES", please answer question "3".

3. What is the total amount (100%) of any damages sustained by DERRECK S. ROLLE, AARON ROLLE, GLENDORA D. ROLLE and GENEVA HARRIS caused by the death of DORETHA ROLLE.

Total damages of:

DERRECK S. ROLLE                      \$165,000.

AARON ROLLE                              \$165,000.

GLENDORA D. ROLLE                      \$165,000.

GENEVA HARRIS                           \$100,000.

SO SAY WE ALL THIS 1 day of JUNE 1984.

/s/  
FOREPERSON

Accordingly, in accordance with the foregoing, it is therefore:

1. ORDERED AND ADJUDGED that FINAL JUDGMENT be and it is hereby entered in this cause in favor of the Plaintiffs and against the Defendant, CITY OF MIAMI, in the sums of \$165,000. for DERRECK S. ROLLE; \$165,000. for AARON ROLLE;



\$165,000. for GLENDORA D. ROLLE; and \$100,000. for GENEVA HARRIS, survivors, all lawful money of the United States of America, plus legal interest thereon from the date of this Judgment.

2. IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction of this cause for any and all post trial motions; for the determination of statutory attorneys' fees; and for the determination of the taxation of costs by the Plaintiffs against the Defendant as per this Order.

DONE AND ORDERED at Miami, Dade County, Florida, this 12th day of June 1984.

/s/  
CIRCUIT COURT JUDGE





Conformed copies furnished to:

Donald Feldman, Esq.  
Feldman & Levy, P.A.

David L. Magidson, Esq.  
Abramson & Magidson, P.A.

Gisela Cardonne, Esq.



CERTIFICATE OF SERVICE

I, DONALD FELDMAN, being over the age of 18 years, hereby certify that I have this fourteenth day of October, 1986, served three copies of the foregoing Appendix to Petition For Writ of Certiorari to the District Court of Appeal of Florida, Third District, to all counsel of record listed below with their mailing addresses, by mailing said copies in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, Miami, Florida.

Lucia A. Dougherty  
City Attorney  
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#1101  
Miami, Florida 33131; and

Thomas M. Pflaum, Esq  
Simon, Schindler, Hurst  
& Sandberg  
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Miami, Florida 33130.

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Counsel for the Petitioner  
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By: Donald Feldman  
Donald Feldman